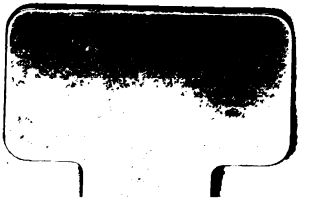

APPENDIX

TO THE

SECOND EDITION

OF THE

LAW OF THE FARM.

BY

HENRY HALL HIXON,

[illegible]

[illegible]

LONDON:

V. AND R. STEVENS, SONS, AND HAYNES,

[illegible]

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1861.

APPENDIX

TO THE

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LAW OF THE FARM.

BY

HENRY HALL DIXON,

BARRISTER-AT-LAW, OF THE MIDLAND CIRCUIT.

"O fortunati nimium, sua si bona norint, Agricolæ."

LONDON:

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THE LAW OF THE FARM.

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CHAPTER I.

AGRICULTURAL CUSTOMS.

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CHAPTER II.

INTEREST IN LAND.

Payment of legacies out of sale of growing crops.—Growing crops are an interest in land within the statute of mortmain (13 & 14 *Vic.*, c. 94). And *per Stuart* V.C.: "If growing crops pass under a devise of land, how is it possible to say that the legacies which the testator has given to these charities would be paid out of monies arising from the sale of pure personalty, if they were paid out of the sale of growing crops?" (*Symons* v. *Marine Society*).

Easement of "grass for a cow" creates no interest in land.—A gift by will, dated in 1838, to J. M. "of the house she lives in, and *grass for a cow* in G field," part of another estate, passes an estate in fee in the house, but does *not* create a permanent interest in the land of the other estate.

And *per* Sir J. *Romilly* M.R.: "The grass for a cow was not necessary for the enjoyment of the house; it passed no interest in the land, but merely gave a personal right to Jane Malcolmson by way of easement to pasture a cow on a field given absolutely to another, as long as she thought fit" (*Reay* v. *Rawlinson*).

Indivisible contract for interest in land.—In *Hodgson* v. *Johnson* (Jurist, April 2, 1859) plaintiff and defendant agreed by word of mouth that plaintiff should become a tenant in his stead, of a brick yard, and take the plant upon a valuation, and that defendant should settle with the landlord for the rent due, and for plaintiff becoming tenant upon the same terms as he held the premises. Plaintiff having entered into occupation, and worked the ground, a distress was put in for rent due from defendant to the landlord; and in an action to recover damages for breach of defendant's promise to pay the rent, it was held by the Court of Queen's Bench that the promise in respect of which the plaintiff sued was part of an indivisible contract for an interest in land within sec. 4 of stat. 29 *Car.* II. c. 3, and that therefore plaintiff could not recover. And *per Campbell* C.J.: "The principle of the decision in *Green* v. *Saddington* [see *Law of the Farm*, p. 51] is, that there were in that case two separable contracts — not that there was one contract which might be split in two, and that a new consideration was constituted on the part performance of the contract." And *per Crompton* J.: "I entertain a strong opinion upon *Green* v. *Saddington*, where it was thought by the majority of the Court that the contract being executed as far as regarded the land, and the promise sued on relating wholly to money, the plaintiff might recover. That decision can only be defended on the ground that there were two contracts. In this case it is clear that there is only one, and one part of it cannot be severed from the other."

Contract by parol to live at a boarding-house.—Where the defendant agreed by parol with plaintiff, who kept a boarding-house, *to pay for the board and lodging of himself and servant, and accommodation for a horse*, £200 a year from a given day, terminable by either party at a quarter's notice—this was held *not* to be a contract in or concerning land within the Statute of Frauds, and plaintiff could maintain an action for the breach of it. And *per Blackburn* J.: "In *Inman* v. *Stamp*, (1 Stark, N. P. 12), and *Edge* v. *Strafford*, (1 C. and J., 391), there would have been an actual demise, had the contract been executed giving such a right. In the present case, there was no contract that defendant should become tenant or occupier of *any specific room*, and therefore there was no intention to pass any interest in that room" (*Wright* v. *Stavert*).

Right of mortgagee of tenant's fixtures to enter and sever them.—The mortgagee of tenant's fixtures has a right or interest in the land, which the tenant who has mortgaged cannot defeat by a subsequent surrender of the lease to his landlord; and if he does so surrender, the mortgagee has a right to enter and sever such fixtures, and may maintain an action against an incoming tenant who has prevented him from exercising such right, and recover the value of the fixtures as severed. And *per Curiam*: "This doctrine has been fully adopted and acted on

in modern cases, as in *Pleasant* v. *Benson* (14 East, 234), *Dd. Bleadon* v. *Pyke*, (5 M. & S., 146), and *Pyke* v. *Eyre* (9 B. & C., 909). The question is thus reduced to the inquiry whether *the mortgagee's right to sever the fixtures from the freehold* is 'a right or interest' within the meaning of this rule of law, and we are of opinion that it is. Certainly it is an interest of a peculiar nature in many respects, rather partaking of the character of a chattel than of an interest in real estate; but we think it is so far connected with the land that it may be considered a right or interest in it, which, if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender" ((*London and Westminster Loan Company* v. *Drake*). The price of fixtures, *as such*, cannot be recovered under the common count of goods sold and delivered (*Lee* v. *Risdon*, Taun. 189); but it would be otherwise if they had been first removed (*Wilde* v. *Waters*, 16 C.B., 637; *Dalton* v. *Whittem*, 3 Q. B., 961 [see *Law of the Farm*, p. 365]; and *Pitt* v. *Shew*, —4 B. & Ald., 206).

Chapter III.

EASEMENTS.

Free passage of air to a windmill. It was held in error, affirming the decision of the Court of Common Pleas, that a right of free passage of air is *not* an easement within the meaning of section 2 of the Prescription Act, 2 & 3 *W.* IV. c. 71. A grant of a free passage of air to a windmill over the soil of another *cannot be presumed* from twenty years' use of the windmill, for the presumption of a grant only arises in cases where the owner of the servient tenement had it in his power to prevent the enjoyment, and did not; and it is not practically in the power of an owner of neighbouring land to preclude the passage of air to a windmill. And *per Wightman* J.: "We think, in accordance with the judgment of the Common Pleas and *Chasemore* v. *Richards* (7 H. L. Cas., 349, and 29 L. J., N.S., Ex., 81) [see *Law of the Farm*, pp. 128, 129], that the presumption of a grant from long-continued enjoyment, only arises where the person against whom the right is claimed might *have interrupted or prevented the exercise of the subject of the proposed grant.* As was observed by Lord *Wensleydale*, it was going very far to say a man must go to the expense of putting up a screen to window-lights to prevent a light being gained by twenty years' enjoyment" (*Webb* v. *Bird*). The ruling of the Court of Common Pleas was affirmed in the Exchequer Chamber.

Prescriptive right to light for windows.—A and B occupied adjoining houses, as tenants to the same landlord, under long leases, which were made on the same day, and to expire at the same time. B, by building on his own premises, obstructed the access of light to a window in A's house, through which the light had passed without interruption for more than twenty years; and it was held by the Court of Exchequer Chamber that A, by the twenty years' user, had acquired a right to the light, and might maintain an action against B for obstructing it, though they occupied these premises as tenants and under the same landlord; and the observations of *Coleridge* J. and *Cresswell* J., speaking of the 3rd section of the Prescription Act in *Truscott* v. *Merchant Taylor's Company* (11 Ex., 863; and 21 L. J., N.S., Ex., 173), were cited in support of their views. The former learned judge observed: "The third section seems to simplify and almost new found the mode of acquiring the right to access of light. It founds it on actual enjoyment for the full period of twenty years without interruption, unless that enjoyment is shown to have been by consent or agreement expressly made by deed or writing,

thus putting the right on a simple foundation, and with the simplest exception" (*Frewen* v. *Phillips*).

Ancient windows restored after improper enlargement to their original size resume their original easement. If ancient windows which look over the land or upon the premises of another are enlarged, and are complained of, the Court, upon their being restored to their original dimensions, will restrain the owner of the adjoining property from obscuring such restored windows; and if an owner of lands complains of an easement usurped over his property, and delays his application for relief, a court of equity will not interfere until he has established his right at law to an abatement. If the owner of a tenement has windows looking upon the premises of another, he cannot increase their size or number, or claim more extensive rights. *Per* Sir J. *Romilly* M.R. (*Cooper* v. *Hubbuck*).

Twenty years' enjoyment of light, how calculated.—The period of twenty years' enjoyment, which confers a right to the access of light under 2 & 3 *Will.* IV. c. 71, s. 3, is, by s. 4, *the period of twenty years next before any suit or action* wherein the claim to the right was brought into question; and is not limited to the period of twenty years next before the pending suit or action. *Per Erle* C.J., *Willes* J., and *Byles* J.; *Williams* J. *diss.* (*ib.*)

Ancient rights may be altered, provided they are not made more extensive. In *Turner* v. *Spooner*, the plaintiff was the owner of a house abutting upon a back-yard in the occupation of the defendants, and possessed two ancient lights overlooking such yard, which, for the greater acquirement of light and air, he modernized by *removing the old casements, and substituting new ones of a lighter construction*, but not extending the aperture occupied by their frames. The defendants then proceeded to erect and glaze with opaque glass a framework close to these improved windows; and a bill was filed for an injunction to restrain such proceedings. It was held by *Kindersley* V.C. that a party possessed of ancient lights has a right to acquire an increased access of light and air if he can do so without altering the aperture, and this does not create a new easement; that the owner of an ancient light is entitled to use it in any manner he pleases, by obstructing, opening, or protecting it, or by taking away old window-frames and substituting new ones of a much less size and thickness, so that he does not extend the aperture itself, and that the intrusion upon a neighbour's privacy is not a ground for interference, either at law or in equity.

New lights not corresponding with old.—The warehouse of the plaintiffs, which had ancient windows, having been burnt down, was rebuilt by them. In the new warehouse, the windows were placed in different situations and were of different sizes, and altogether occupied more space than the windows of the old building. Some parts of some of the new windows coincided with some parts of the old, but a greater portion of the old and new windows did not coincide. The defendants, who had premises on the other side of the street, raised their own house, and so obstructed the access of light to the new windows. They could not have obstructed the passage of light to such portions of the

windows as were new without at the same time obstructing its passage to such portions of the new windows as were on the sites of the old windows. It was held by the Exchequer Chamber, confirming the judgment of the Common Pleas on a special case, that the plaintiffs, under these circumstances, could not maintain an action against the defendants for obstructing the passage of light to their warehouse windows, as no one of the existing windows substantially corresponded with any of the ancient lights; and *per Channell* B. and *Blackburn* J., that it was not necessary in the present case to decide whether there is a right to block up a new window, if it cannot be done without also blocking up an ancient unaltered one. And *per Curiam:* "We entirely concur in the judgment of *Patterson* J., in *Blanchard* v. *Brydges*, (4 Ad. & E, 176), that lights in respect of which the right of action is sought to be enforced must be substantially the same as the lights which have been gained by user or grant, and that no new light can be substituted without the consent of the owner of the servient tenement" (*Hutchinson and Others* v. *Copestake and Others*).

Right of digging for brick earth to be taken into consideration under the General Inclosure Act.—Where proceedings were taken under the General Inclosure Act, 8 & 9 *Vic.* c. 118, for the inclosure of certain land at the instigation of persons who claimed rights of common over the same, and the owner of such land was interested therein in respect of brick-earth which he could get from it without interfering with the rights of common, it was held that the interest of such owner in respect of the brick-earth ought to be taken into consideration by the Assistant Commissioner in calculating the interests of the assenting and dissenting parties, under sec. 27, notwithstanding all "mines, minerals, stones, and other substrata" had been expressly reserved to such owner by the provisional order; and the Court granted a prohibition against the Commissioners proceeding with the inclosure without the consent of such owner, or taking the value of his interest in the brick-earth into account in reckoning the assents and dissents (*Church* v. *Inclosure Commissioners*).

Custom to dig clay in a copyhold not unreasonable.—A custom in a manor that copyholders of inheritance may, without licence of the lord, break the surface and dig and get clay without stint out of their copyhold tenements, for the purpose of making bricks for sale off the manor, is good in law. This was decided in error on a bill of exceptions to the ruling of *Byles* J., and the judgment of the Exchequer affirmed. It was contended that the custom to take the soil and surface without stint tends to the destruction of the inheritance, and is unreasonable and void in law, but *per Curiam:* "We are, however, unable to draw any sound distinction between a custom for copyholders to take all the timber or trees, or all the minerals, in their copyholds, and such a custom to take clay as that in question. It appears to us that the cases of *profit a prendre* or easement on the waste of the lord or *in alieno solo*, have no application to the present question. A copyholder may, by custom, not only have a possessory but a proprietory right in the trees and minerals in his copyhold tenement. In the case of minerals, the taking them is, in effect, a taking of a portion of the

corpus of the copyhold tenement. There appears to be no doubt but that a copyholder of inheritance may not only, by custom, work old mines already opened, but that he may also by custom dig within his tenement for new ones, and, if successful, work them. The case of the *Bishop of Winchester* v. *Knight* (2 Ld. Raymond, 1056; and 1 P. Williams, 406), [see *Law of the Farm*, p. 231] is an authority for the proposition that by custom a copyholder of inheritance may open and work new mines. *Gilbert*, C.B., in his treatise on tenures, p. 327, says that a copyholder of inheritance cannot without a custom dig for mines; obviously meaning that with a custom he could. In *Scriven on Copyholds*, p. 420, it is said that by custom a copyholder of inheritance may be entitled to the trees and mines in his copyhold. The plaintiff's counsel in his argument did not doubt but that a custom for a copyholder to have and work quarries and mines might be good, but contended that the surface must be left. But no case was cited to warrant such a conclusion. It may be that the mine or minerals, or a quarry of stone, might occupy the whole surface of the particular copyhold tenement, and that a general right to take stone or minerals would necessarily involve the taking of the surface. But in the present case there is nothing to show that the taking the clay would necessarily involve the taking of the surface. All the clay might be so situate as to be capable of being got at, as coals or other minerals. But however that may be, we think there is nothing to show that such a custom as that in question is unreasonable or bad in point of law; and we may further observe that it is said, in *Scriven on Copyholds*, p. 26, that a custom is not unreasonable because it is prejudicial to or diminishes the lord's casualty profit as to escheat. For these reasons, we think the defendant is entitled to our judgment" (*Marquis of Salisbury* v. *Gladstone*).

Definition of surface damage.—The words "surface damage" in the Forest of Dean Act (1 & 2 *Vic.*, c. 43 s. 68) do not include damage to buildings on the land, by reason of the subsidence occasioned by underground workings. This "surface damage" is damage to the mere surface, injury to the crops, or destruction of the grass, compensation for which can be ascertained by computation, and determined upon by the gaveller. To cause a subsidence of the soil, partially or wholly destroying the future fertility of it, is not a surface damage; it may be damage to the house and land, but it is not surface damage (*Allaway* v. *Wagstaff*).

Injury to surface by working mines.—*Rowbotham* v. *Wilson*, was [see *Law of the Farm*, p. 63] affirmed in the House of Lords, and the judgment of the Queen's Bench upheld, and it was decided that *the right to work mines is an incident to the grant of mines*, that though the covenants could not operate as a release of the general right of a surface owner to the support of the subjacent soil, it did operate as a grant of the right to work the mines, and thereby injure the surface, provided such injury was not the result of negligence or unskilfulness (*Rowbotham and Others* v. *Wilson*.

Support to land from drowned mine.—Although as between con-

terminous owners the lateral support of a neighbour's soil can only be claimed for the surface of the land in its natural state, yet where a person sells land to another, to be used for an express purpose, he will not be allowed to derogate from his own grant by doing anything on the adjacent soil, which unfits the land sold for the purpose for which it is sold; and it makes no difference that the land so sold was taken under compulsory powers; but the purchaser is not entitled to any additional support afforded by the accidental state in which the adjacent soil happens to be, at the time of the purchase, however long it may have been in that state prior to the purchase. Thus where the owner of a drowned mine sold land to a railway company for the purpose of building a bridge, and the land sold derived additional support from the water in the mine, it was held that the railway company were not entitled to restrain him from pumping out the water, and restoring the mine to a working condition, although the mine had continued in its drowned state, and the works had been abandoned for a period of forty years prior to the purchase (*North Eastern Railway Company* v. *Elliot*).

Right of railway to support from adjoining Lands.—A railway company is entitled to the vertical and lateral support of the adjoining lands of the proprietor from whom the lands or easements required for the railway were purchased; and such proprietor is not at liberty to work the minerals adjoining the railway in such a way as to cause damage to it; and in the absence of statutory provisions he cannot compel the company to purchase them (*North Eastern Railway Company* v. *Crosland*).

Title of owner of ancient house to lateral support from adjoining Land.—Semble by V. C. Wood V.C.: "The owner of an ancient house is entitled to the lateral support of his neighbour's land, as well for the house as for the surface of the soil itself (*Hunt* v. *Peeke*).

Statute of limitations in case where damage has been done to the surface by mining.—The judgment in *Bonomi* v. *Backhouse*, (27 L.J. (N.S.), Q.B. 378), and that in *Nicklin* v. *Williams* (10 Ex. 259, [see *Law of the Farm*, p. 62, 63], on which it was based, were over-ruled *in Error*. In the former, the defendant, owner of certain mines in 1849, withdrew the pillars of coal which had been left as support to roofs in some of the old workings. The consequence was that the roof of the mine fell, the adjacent *strata* subsided one after the other in slow succession, and at last in 1854, the support of the intermediate strata having given way, the plaintiff's land, which was 280 yards of defendant's mines, sank, and the house on it was injured. The plaintiff brought his action in 1856. It was ultimately held, reversing the judgment of the Queen's Bench in this case, and *Nicklin* v. *Williams* s well, that the Statute of Limitations was no bar to the action, as no cause of action arose to the plaintiff's by the mere excavation by the defendant of the pillars of plaintiff's coal in his own land, so long as it caused no damage to the plaintiffs, and that the *cause of action first accrued when the plaintiff's received actual damage.*

Compensation for Injury to Buildings by Subsidence of Soil.—When the working of mines, in however careful a manner, has occasioned

the subsidence of the land of another, although not immediately adjoining, damages may be recovered in respect of injury to buildings thereon erected or enlarged within twenty years, provided their weight did not occasion or contribute to the subsidence; and the action is maintainable for damage to the possession and the reversion (*Hamer and Stroyan* v. *Knowles*).

Right of soil to support for additional weight of buildings.—A right to support for additional weight of buildings may be acquired as an easement by twenty years of uninterrupted enjoyment (*Partridge* v. *Scott*, 3 M. and W. 220), and after twenty years a house acquires a right to the lateral support of soil round it (*Browne* v. *Robins*).

Three-fourths of a right of common.—A plea of prescriptive right to three-fourths of a right of common of pasture for one cow is bad (*Nichols* v. *Chapman*).

Evidence of existence of highway.—In an action of trespass for breaking and entering the plaintiff's land, on an issue raised whether there was a highway over the *locus in quo*, there was evidence that there had been a highway over the adjacent land, which was then, together with such *locus in quo*, an open common. There was also evidence that for many years the highway was obstructed by part of it being included in an enclosure, which had been illegally made on such common; and that during twenty years of that time, the public had deviated a little from the line of way, by going outside such enclosure, and on the *locus in quo*. At the end of such time, and before the plaintiff became the owner of the *locus in quo*, the use of such substituted line of way was discontinued by reason of a new road having been laid out in a different direction by an adjoining land proprietary. Afterwards, the obstruction to the old road was removed, and the original line of way was reopened to the public. It was held by *Erle* C.J. and *Byles* J. (Williams J. diss), that there was no reasonable evidence on the above facts, on which a jury might find that there was, in addition to any other highway, a highway running over the *locus in quo* (*Dawes* v. *Hawkins*).

Evidence of user and dedication.—Although a *cul de sac* may be a highway, and although the old doctrine that a highway must lead from one public place to another may not be strictly correct, yet where a road leads to a place which is not public, and which the public enter only by permission (as where it leads to the gates of a park), the user of the road by all persons who seek such entry without evidence of user for any other purpose, is not a user sufficient to warrant the conclusion of a dedication to the public as a highway and a liability in the parish to repair (*Reg.* v. *Parish of Hawkhurst*).

Full right of public to enjoyment of highway.—Where an ordinary highway runs between fences, one on each side, the right of the passage which the public have along it extends *primâ facie*, and unless there be evidence to the contrary, over the whole space between the fences; and the public are entitled to the use of the entire space (*Reg.* v. *U.K. Electric Telegraph Company (limited)*.)

Enclosing to within fifteen feet of centre of highway.—The com-

mon notion that owners of land on the sides of a highway may encroach or enclose up to within fifteen feet of the centre is an error, and the question will always be as to the extent of the highway by user: per *Erle* J. (*Reg.* v. *Johnson*).

Right of Justices to determine whether road is a highway.—On the hearing of a complaint under 5 and 6 Wm. IV., c. 50, sec. 73, for leaving rubbish on a highway, after notice to remove it, the defendant, who was the owner of the land on both sides of the alleged highway, denied it to be the highway, and as he claimed the soil subject to a private right of way only, he contended that the justices ought not to adjudicate in the matter, on the ground that title to land came in question; and it was held that the objection was untenable, for that the justices had jurisdiction under the statute to determine whether the road was a highway or not. And per *Wightman* J., the question of title to the land does not properly arise; and per *Crompton* J. "I was struck by the way the point was raised, viz., that the matter of title comes into question, because the appellant claims the land subject only to the easement of a private right of road. As a general rule, no doubt, justices are not to decide on summary conviction, the title to land; and as I said in *Reg.* v. *Cridland* (27, L.J. (N. S.), M. C. 28), this does not depend on any exception in the particular statute, so much as on the principle generally applicable to summary convictions. But in this particular case, the magistrates were to decide on the question whether the alleged highway was a highway or not; this in some sort may be said to involve a question connected with title to land, but that consideration cannot oust them of jurisdiction where they are the tribunal appointed to decide that very question, highway or no highway. The very foundation of their jurisdiction in the matter depends on this question, and the very first step is to ascertain whether the *locus in quo* is a highway. They are not really trying a question as to any title to land; in this case the title to the land was admitted, and the only question was, is the road a highway or not? That is the very thing which, as to any other individual, the justices are to try, and why not when the person guilty of the alleged nuisance is the owner of the land? My notion is that if an Act of Parliament gives jurisdiction to justices or other inferior tribunal over a matter connected with land, there must be a special exception to the Act, in order to oust their jurisdiction, where the title comes in question, as in the County Courts and Malicious Trespass Acts. The appellant seeks to oust the magistrates' jurisdiction, by alleging that the road is not a highway; any other person might set up this defence, and it is a question of user by the public, and is not founded on title, but arises just as much as to any one of the public, as to the particular owner of the land; and this question of highway is the very question which the Legislature says the justices are to decide" (*Williams* (*appt.*) v. *Adams*).

Distinction between a private and a public way.—"It appears to me that there is this distinction between a private and a public right of way, that the former is not necessarily, as the latter is, *over every part of the land,* to which people have access, or along

which there is the right of way:" per *Cockburn* C.J. (*Hutton* v. *Hamboro'*).

Duty of surveyor to protect foot-causeways against carriages.—The 24th section of the General Highway Act (5 and 6 Wm. IV., c. 50), which requires the parish surveyor to secure horse and foot-causeways from being passed over by carriages, *applies only to such as are by the side of carriage-ways;* and therefore such surveyor is not bound by that statute to protect horse and foot-causeways against carriages at the extremities of such ways (*Ellis* (*appt.*) v. *Woodbridge*).

Surveyor of highways not liable for accident caused by non-repair of Road.—A surveyor of highways appointed under 5 and 6 Wm. IV., c. 50, is not liable to an action for damages resulting from an accident caused by the non-repair of the highway, as was substantially decided in error in *Mc Kinnon* v. *Penson* (9 Ex., 609, and 23, L.J. (N. S., M. C. 97) (*Young* v. *Davis*).

Presumption of property on soil of private road.—The presumption which prevails in the case of a public highway, that the soil *usque ad medium filum viæ.* belongs to the owner of the adjacent land, prevails also in the case of *a private way*; provided that there be no other evidence of ownership to rebut such presumption (*Holmes* v. *Bellingham*).

Right of way appurtenant.—A plot of building ground having been conveyed with a right of way over a new road leading thereto from a high road, it was held by the Court of Common Pleas that if that plot of land is subsequently demised by parol, the right of way passes also, although not specially mentioned (*Skull* v. *Glenister*).

Implied grant of way of necessity.—Where the owner of a farm severed it by will among his two sons, and the moiety devised to one son was landlocked, except where it abutted on the moiety devised to the other, yet the will made no mention of any ways whatsoever, it was held by the Exchequer Chamber, affirming the decision of the Court of Queen's Bench, that some way passed by implication under the will, and that the Court would look at the previous occupation of the testator's property to see what way was meant by him to pass. Under these circumstances, where the access to the landlocked premises, and to the farm buildings upon them, had been in the testator's lifetime by one particular road across the moiety devised to the other son, and the enjoyment of the landlocked premises in the state they were in when devised was not complete without this particular road, the Court held that this particular road passed under the will, and not merely "a way of necessity"; and *semble*, that if a way of necessity only had passed, the way would have been limited by the necessity (*Reg.* v. *Pearson*).

Conveyance of a close adjoining highway implies that of highway usque ad medium filum viæ.—Where a close of land adjoins a highway, the presumption of law is that half of such highway, *usque ad medium filum*, passes with the conveyance of the close; and such presumption is not rebutted by the fact that the close is separated from the highway by a fence, and is defined in the conveyance by admeasurement and reference to a plan which did not include such highway, and the cases

of Simpson v. *Dendy* (8 C. B. 433), and *Lord* v. *the Commissioners of the City of Sydney* (12 Moo. 473), are authorities to that effect (*Berridge* v. *Ward*).

Map held inadmissible under certain circumstances to prove rights of way.—To prove that there was a public right of way over certain closes, part of a manor, the defendant put in evidence a map used by a deceased steward of the manor at the Manor Courts, for the purpose of defining the copyholds. In it, there appeared a space marked out by two lines crossing the closes in question, and called Mellow Lane. There were occupation ways, as well as public highways, marked upon the map, but there was nothing to distinguish one from another, nor was there anything to show that the space marked out as above mentioned was a public highway at all. The map was held inadmissible: the deceased steward did not make the map, nor was it proved to have been made by any one who had knowledge of the facts (*Pipe* v. *Fulcher*).

Order of Justices to stop up a public carriage-road under an Inclosure Act, implied by long acquiescence.—An award made in 1830, under an Inclosure Act, which empowered the commissioners to stop up highways, subject nevertheless to the order and concurrence of two justices, directed a certain public highway for carriages to be stopped up. Ever since the award (*i.e.*, for 28 years) the road had been stopped up by a gate, and had never been used by the public, with carriages or horses. There had, however, been some user by foot passengers. No proof was given that the requisite order of justices had ever been made. It was held by the Exchequer Chamber, confirming the decision of the Court of Exchequer, that from the non-user of the road for so long a period, the jury might presume that there was such an order (*Williams* v. *Eyton*).

Power of Inclosure Commissioners to set out private road.—Where a provisional order has been made under the Inclosure Acts, ordering certain land therein described to be allotted to an individual, in lieu of his right in the lands to be enclosed, and the order *does not expressly exempt such allotment* from having a right of way reserved over it, the Inclosure Commissioners have power, in proceeding with the inclosure, to order the valuer to set out a private road over such land, for the use of another landowner; and per *Erle* C.J., "The words of 11 and 12 Vic., c. 99, s. 4, giving the valuer power to set out private roads, are extremely wide, and give the Commissioners jurisdiction in the matter" (*Grubb* v. *Inclosure Commissioners*). Affirmed in Error.

Appropriation of a private rights of way by Private Estates Act.—A Private Estate Act (6 Wm. IV., c. 13) enables tenants for life to grant building leases, and empowers the lessors to lay out, and appropriate any part of the land authorised to be leased, as for a way, street, square, passage, or sewer, or other conveniences for the general improvement of the estate, and the accommodation of the tenants and occupiers. It was held that extensive private rights of way over such appropriated land might be granted to particular lessees, as such appropriation did not confer a right of user by all the tenants and occupiers (*White* v. *Leeson*).

Right of way under deed of partition.—*Pyer* v. *Carter* was quite distinguished from *Worthington* v. *Gimson*, in which there is no ground for saying that there was any necessity at all for the way claimed. There *H* and *P* being seised of undivided moieties in the N and N V estates, entered into a deed of partition, by which the N V estate was conveyed to H, and the N estate to P. A way had existed for many years, leading from a farm on the N estate, occupied by the plaintiff over his land, and over land occupied by the defendant on the N V estate. The way had been used by the occupier of the plaintiff's farm before and after the 20th of January, in which month the the deed of partition was executed. By the deed, H conveyed his undivided moiety in the N estate to P, and as part of the farm occupied by the plaintiff with others, "with their and every of their rights, members, easements, and appurtenances." P also conveyed his undivided moiety in the N V estate to H. The plaintiff and his predecessors used the way up to January 1859, when it was obstructed by the defendant. It was held in an action brought by the plaintiff in respect of such obstruction, that the way in question did not pass under words used in the deed of partition, and that the plaintiff could not recover (*Worthington* v. *Gimson*).

Evidences of dedication of private farm road to the public.—The occasional user of a farm road by strangers chiefly for purposes of pleasure is evidence of a public rather than a private way, and may be evidence of a dedication to the public as a highway, but must be well weighed with reference to permission, repair, and all other circumstances tending to show whether the owner ever intended such a dedication, especially if it leads to a place of resort for mere purposes of pleasure: per *Erle* C.J. (*Mildred* v. *Weaver*).

Mere tracks in wood not proof of highway.—The mere use of tracks in a wood by people where they were free to wander about as they pleased, is not necessarily enough to show a dedication of such tracks to the public as public footways—per *Erle* C.J. *Chapman* v. *Cripps and Others* (2, F. and F. 864); and evidence that in a place of resort for pleasure, as a wood or the like, people have gone about wherever they pleased, there being no definite enduring trackway in any particular direction, but merely temporary and transitory tracks, not passable in wet weather, varying every season and never proved to be repaired, was held by *Wightman* J. not to be evidence on which a jury could properly find either a public highway or a public *right* of resort for air and exercise, or a prescriptive right of way (*Schwinge* v. *Dowell*).

Charging settled estate with expense of road through another part of the estates.—The court will not sanction the sale of any part of settled estates, that the purchase-money may be applied in laying out and making roads through another part of the estates: per *Romilly* M.R. (*In re* Chambers's Settled Estates).

Ploughing up footpaths.—In *Bright* v. *Sweet*, which was tried at Taunton Assizes some years since, the *law as to ploughing up footpaths* was thus laid down: "In this case, which was an indictment brought by *certiorari* from the Quarter Sessions, it appeared that there was a public footpath across the lands

of the defendant, who had been accustomed to plough up the paths, to the great inconvenience of the public. The right of way being established by undisputed evidence, the learned judge declared the law to be: That if the public were entitled to a road (or footway) at all, they were entitled to a good one, and that either the parish or the person occupying the field, as the custom might be, was bound to keep it in a proper state for the use of the public; that if the road (or path) led from a village to the church, he apprehended the proper persons to repair were the parish officers or way wardens; that it was easy if the farmer chose to plough up the field without ploughing up the footpath, and if he did plough it up he was liable to *fine and imprisonment* for destroying the road (or path); that the King's subjects were not to be put to inconvenience, merely because he would not give himself a little additional trouble in passing the plough parallel with the path;" and the defendant was fined 40s.

Discharging water from eaves on to land subject of action by reversioner.—Building a roof with eaves, which discharge rain-water on to the land, may be injurious to the reversion, and will warrant the jury in finding that the act alleged is an injury of a permanent character to the land. But if the act be done merely with the view to establish an easement on the land, and is not in fact injurious to the reversion, the action will not lie. The action by the reversioner is independent of that by the tenant for damage to his possession. The Prescription Act (2 and 3 Will. IV., c. 71, s. 8), reserves to the reversioner three years for resisting any claim after his estate has come into possession, though the full period of prescription has previously elapsed (*Tucker* v. *Newman*).

Rule as to going 100 *yards through turnpike-gate.*—A person who had here come on to the turnpike-road 20 yards below the gate, and passed 300 yards through it, is liable to pay toll at a toll-gate, on a turnpike road, *though he has not travelled* 100 *yards* on the road before coming to the gate, if, after passing through the gate, he uses the road *for a space which together with that he has passed over previously exceeds in all the distance of* 100 *yards* (*Horwood* v. *Powell*).

Composition for tolls made by lessees are not illegal (*Stott* v. *Clegg*). *Construction of "other thing" in Turnpike Roads Act.*—The words "other thing" in 3 *Geo.* IV. c. 126 s. 121, which imposes a penalty on persons drawing "any timber, stone, or other thing" on a turnpike road otherwise than on a wheeled carriage, were held to apply (*Cockburn* C.J. *dub.*) only to things *ejusdem generis*, and therefore not to a load of straw. Judgment was therefore for the respondent, and the view of the magistrates who had dismissed the information upheld. He had used a vehicle on two wheels, so constructed, that when going down hill the front part of the vehicle came into contact with the road, and ploughed it up, acting as a kind of drag, but it was only laden with straw. The Court thought that this was a sledge, and not a carriage on wheels within the act, as the magistrates had decided; but they agreed with them that the general words in the section must be limited to things of the same nature, and calculated to produce the same mischief as those enumerated, and dismissed the appeal (*County Road Board of Radnor* v. *Evans*).

CHAPTER IV.

TREES AND FENCES.

Rights of Lord over waste, planting trees, &c.—Where fences are wrongfully erected upon land subject to a right of common, the commoner in exercising his right is not restricted to pulling down so much of the fence, as it may be necessary for him to remove in order to enter on the *locus in quo*, but he may remove the *nocumentum injuriosum*. The lord may, however, make his waste beneficial to himself *by planting trees upon it*, as they may afford shade to the commoner's cattle at certain seasons of the year. He may also *turn in rabbits*, if he leave sufficiency of common for the commoners. Such an act is not *primâ facie injuriosum*. It is, *primâ facie*, the exercise of his legal rights as owner of the soil (*Arlett* v. *Ellis*).

Effect of sale of timber by tenant for life to trustees of remainder man.—If a tenant for life, without impeachment of waste, sells for value "all and singular the timber and timber-like trees then growing or being, or which should thereafter grow or be upon settled estates" to trustees, for the benefit of those in remainder, he will be *restrained from either cutting or thinning the timber: per Romilly* M. R. (*Gordon* v. *Woodford*).

Cutting of timber by tenant for life.—Where timber ripe for cutting is cut by a tenant for life impeachable for waste, he *is entitled to the income of the fund produced by the sale thereof;* and the first person taking an estate unimpeachable for waste will, on coming into possession, be entitled to the capital. Where the timber so cut is not ripe for cutting, *semble* the produce belongs immediately to the first person having an estate of inheritance, passing over all the intermediate life estates, whether impeachable for waste or not. But whether it belongs to him or to the first tenant for life unimpeachable for waste, the cutting being a tort, the remedy is by action at law, and not in this court. Therefore under no circumstances can a tenant for life unimpeachable for waste, be entitled, on coming into possession, to back interest on the produce of timber, whether properly or improperly cut by a previous tenant for life, impeachable for waste: *per Wood* V.C. (*Gent* v. *Harrison*).

Tenant for life barred by lapse of time from receiving proceeds of timber cut down by previous tenant.—A tenant for life cut timber in excess of what he was entitled to cut; nearly 20 years after his death, the succeeding tenant for life filed a bill for an account, and to make the estate of the deceased tenant for life liable for the timber cut in

excess; and it was held by *Sir J. Romilly* M. R., that *the plaintiff was barred by lapse of time*, and the bill was dismissed with costs. *Roberts* v. *Tunstall* (4 Hare 257, 14 L.J., Ch. 184); *Pryce* v. *Burn*, (cited by Lord Alvanley, 5 Ves. 681); *Gregory* v. *Gregory* (G. Cooper, 201, s. c., Jacob 631), were cited for the plaintiffs on the question of waste; and *Sibbering* v. *the Earl of Balcarras* (3 De G. and S m., 735, and 19 L.J., Ch. 252); and *Pickering* v. *Lord Stamford*, (2 Ves. Jun. 272), cited by the defendants on the question of delay in filing the bill, were thus referred to by His Honour in his judgment. "In *Pickering* v. *Lord Stamford* the Master of the Rolls observed that the very forbearance to make the demand affords a presumption either that the claimant is conscious it was satisfied, or that he intended to relinquish it. Here the claim is made in respect of timber cut during sixteen years' enjoyment of the property by a tenant for life, who died in March 1838, and all this was at the time within the knowledge of the present plaintiff, who seeks redress in March 1858" *Harcourt* v. *White*.

Permissive waste by tenant for life.—The court in *Warren* v. *Rudall* (29, L.J. (N. S.), Ch. 543), quoted *Powys* v. *Blagrave* (24, L.J. (N. S.), Ch. 142), as a proof that the court will not interfere in a case of permissive waste by tenant for life.

Prohibition against timber cutting.—Freehold, copyhold, and leasehold estates were devised and bequeathed to A B in fee simple, subject to a limitation over, by way of executory devise, in the event of A B dying without leaving issue male living at his death, *with a prohibition against his cutting timber*, and with a discretion as to the copyhold and leasehold estates (held upon leases determinable with lives) that such property should be kept "fully estated" with three lives. A B died without issue male, and during his life committed various acts of waste by cutting down timber and allowing the property to become dilapidated. He also omitted to keep the copyholds and leaseholds "fully estated." It was held by *Kindersley* V.C., that it was competent for the testator to impose upon A B the obligation not to cut timber, although without such prohibition he could have done so; and also that A B was under no obligation to repair, and was not liable for permissive waste, but all losses consequent upon his omission to keep the property fully estated with three lives must be borne by the estate (*Blake* v. *Peters*).

Definition of "timber" in a valuation.—The defendant having told the plaintiff, a land surveyor, that he was tenant for life of an estate, and wanted to sell every stick of timber on it, gave him an order signed by himself to value it at a certain rate per cent. The witnesses on both sides agreed that *timber ordinarily meant trees of a certain growth*, and the valuation included mere saplings, so that it did not show the value of the timber, and it was held by *Cockburn* C.J., that there was nothing to show that the word "timber" was not used in its ordinary sense, and that therefore the jury might find the valuation to be valueless (*Whitty* v. *Lord Dillon*).

Fences and trees in churchyard.—At common law the parishioners are bound to repair the fences of the churchyard, although custom

may in particular cases throw the obligation upon either the parson or the owners of particular estates. But the parishioners have no power to cut down trees or mow the grass in the churchyard, without the consent of the parson, to whom they belong. He can, however, only cut down the trees (unless they are decayed) for the repair of the church or parsonage house" (*Holdsworth's Handy Book of Parish Law, p.* 16).

Cutting down ornamental timber or immature trees by devisee in fee. —A devisee in fee, subject to an executory devise over, is not impeachable for waste, but the Court will restrain him from committing equitable waste, by cutting down ornamental timber or immature trees: per *Wood* V. C. This decision was affirmed by Lord Chancellor *Campbell.* His Lordship stated that he was quite willing with *Wood* V.C., to accept the clue by which Lord Justice Turner in *Micklethwait* v. *Micklethwait* (1 De Jex., and Jo. 504, and 26 L.J., Ch. (N. S.), 721), proposed to solve the difficulty. "If a devisor or settler occupies a mansion-house, with trees planted or left standing for ornament round or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may be reasonably presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be deprived of that ornament which he himself enjoyed," but that he could not go as far as the Vice Chancellor, who is reported to have added, "This reasoning obviously applies to every case of an estate limited, so as to go in a course of succession. The tenant for life *sans waste* is as much owner of the timber as the tenant in fee; their legal rights in this respect are identical" (*Turner* v. *Wright*).

Claim of right to enter close of another and cut down trees.—To an action of trespass for cutting down and carrying away trees growing in the close of the plaintiff, the defendant pleaded an immemorial enjoyment of a right in one A B, the owner in fee of a close called "Bloody Field," and all those whose estate he had, and his and their tenants, to enter on a part or strip called a lugfall of the said close of the plaintiff, and to cut down and convert to their own use the trees growing there, such right being claimed as appurtenant to the close of the said A B, but the plea did not allege that the timber so taken was not to be used in any way in or about the said close of A B. Averment that the defendant was tenant to A B of the said close, and that the trees were cut down by the defendant in exercise of the said right. There were other pleas, which set up the enjoyment of a precisely similar right for sixty years and thirty years respectively; and also a plea alleging a grant by deed, which was lost, by the then owner in fee, of the close of the plaintiff to the then owner in fee of the close of the defendant, of the right now claimed. It was held by the Court of Common Pleas, that all the pleas were bad, as the right claimed being a right in gross could not pass with the occupation of the land. *Semble* also that such a right could not pass with the ownership of land; and per *Willes* J., "Except in the case of landlord and tenant, in order that rights over the land of one may be attached to the land of another,

so as to pass with the ownership of the land, they must be such rights as are beneficial to the owner of the dominant tenement, only so long as he remains owner of that tenement, and to other persons are of no benefit whatever." And per *Erle* C.J., "These pleas are bad. They set up in effect a right in the occupiers of the close occupied by the defendant to go upon the close of the plaintiff to cut and take trees; that is to take profit in the shape of wood from the land of the plaintiff; and this right is claimed as passing with the occupation of the close occupied by the defendant. All the diligence and research of Mr. Prideaux have brought before us no precedent for establishing such a right. The case of *Douglass* v. *Kendal* (*Cro. Jac.* 256), was one of a claim of prescription on the part of an owner of a messuage to take all thorns growing in a certain place, "to expend in the said house." This is a right claimed as appendant to an estate, and falls within the well known class of cases, where profit in the land of one is claimed as appendant to the land of another, to be used on the land on which it is appendant. That case does not bear on the present, which is a claim to cut down trees and sell them, or dispose of them in any other way that the claimant pleases. Then *Sir Francis Barrington's case* (8 Co. Litt. 136), and *Liford's case* (11 Co. Litt. 466), have been referred to, to show that a man may grant to A B and his heirs all the grass growing in a certain place, or any other profit arising out of his land; but these are profits in gross and stand on quite a different footing. There is no single case of such a right as is here claimed enjoyed by the occupier of a close, and passing with the occupation of the close. *Hoskins* v. *Robins* (2 *Saund.* 823), has been referred to, but that was a claim by a copyholder to pasture in the lord's soil. It was a claim as one of the customary tenants of the manor to have the sole and several pasture of certain lands within the manor at their will and pleasure. But there are many rights arising out of the relation of lord and tenant of a manor, which have no relation in ordinary law, and from which the validity of rights in ordinary cases cannot be inferred. *Stanley* v. *White* (14 East., 332), in which a reservation of the trees growing in a particular part of a close was held to be a reservation of the land itself, was an entirely different case to this. On the other hand, the cases cited by Mr. Smith of *Clayton* v. *Corby* (5 Q.B. 415, 14 L.J. (N.S.), Q.B. 364), [see *Law of the Farm, p.* 65], are strong to show that the owner of the dominant tenement could not by express grant or by prescription claim such a right as this permanently (*Bailey* v. *Stevens*).

Boughs overhanging land.—It is a nuisance if a man allows the boughs of his trees to grow so that they overhang his neighbour's land (*Earl of Lonsdale* v. *Nelson*).

Taking timber for house-bote.—In a lease for lives of a manor and demesne, the lessee covenanted to repair, and keep the premises in all needful and necessary reparations, having or taking in and upon the demised premises competent and sufficient house-bote for the doing thereof, without committing waste, and it was held by the Court of Queen's Bench that the covenant was an absolute and not

a conditional covenant to repair, with a licence to take timber for house-bote (*Dean and Chapter of Bristol* v. *Jones and Others*, exors.)

Evidence of conversion of tree.—A having sold to B some growing trees, B entered to cut them down, whereupon C, who was on the land as a trespasser, served B with a notice, not to fell any of the timber. B having desisted in obedience to the notice, C subsequently cut down the tree, but left it upon the ground and did not further interfere with it. It was held by the Court of Exchequer, that C the defendant not having detained or exercised any physical control over the felled tree, when it was severed from the soil, had not been guilty of a conversion of it, notwithstanding the notice, which was not an assertion of title to a chattel, but a claim of dominion over the tree before its severance from the realty (*Bird* v. *Bond*).

Custom for customary tenants of manor to fell timber without licence from lord.—A custom for copyhold tenants to fell timber or other trees upon their customary lands, and to retain the same for their own use, without licence from the lord, although such timber may not be felled for necessary repairs, was held by the Court of Common Pleas not to be unreasonable, and such a custom is not the less admissible in evidence because it also professes to entitle the customary tenants to plough up meadow land, and to suffer their houses to decay, which might be a bad custom if pleaded (*Blewett appt.* v. *Jenkins and Williams resps.*)

Leaving quarry unfenced.—A declaration alleged that defendants were seised in fee of waste lands and before the grievance alleged, a quarry had been opened on the land, which was worked by leave of defendants, who received a royalty, that the waste was open to the public, and all persons crossed it with licence of owners. It was situate and near to and between two public highways leading over the waste, and was dangerous to persons who might accidentally deviate or have occasion to cross the waste to get from one road to another, that defendants well knowing the premises left the quarry unfenced, and plaintiff having occasion at night to cross the waste, to get from one of the roads into the other, and not being aware of the existence of the quarry, fell into it, and was injured. It was held on demurrer that the declaration disclosed no cause of action (*Hounsell* v. *Smyth, Bart.*), and *per Curiam*, that the general doctrine as to non-liability of owners of land to fence excavations in their own land was qualified to this extent by *Barnes* v. *Ward*, that the excavation must not be made so near to a road, as to amount to a public nuisance, that if it be, and a private injury result, it is actionable on the principle, that a private injury resulting from a public measure is subject matter of action for damages. *Blythe* v. *Topham* [see *Law of the Farm, p.* 98] is an authority for the proposition that if the owner of waste land dig a pit in the waste, within a certain distance of the highway, he is not liable for injury sustained by cattle that stray from the highway into the waste, and fall into the pit, and the authority of that case is confirmed by the distinction drawn in *Barnes* v. *Ward*, and pointed out by the Court in *Hardcastle* v. *South Yorkshire Railway Company.*"

Canal near public footway.—Where a canal had been made in land

along which ran an ancient footway, and between the canal and footway was a towing-path nine feet wide, and a strip of grass several feet in breadth, and the public were permitted to pass over the whole intervening space which was left unguarded and unlighted, it was held by the Court of Queen's Bench that the canal was not so "near to" or "adjoining" the footway as to be a nuisance or to impose on the proprietors the duty to fence, light, or protect it; and a person passing in the night-time gone astray and fallen into it, the canal company were not liable, under Lord Campbell's Act, to his representative. And *per Curiam*: "We adopt on this subject the law as laid down in *Hounsell* v. *Smyth* (7 C.B. (N.S.), 731), that to throw upon the owner the obligation of fencing an excavation on land adjoining a public road or way, it ought to be shown that the excavation is "so near thereto as to be dangerous to persons using the road in the line of the road." In *Hardcastle* v. *South Yorkshire and River Dun Company* (4 H. and N., 67), it was laid down that the excavation must be so adjoining the public way as that a false step might cause a person using the way to fall into the excavation; and it seems but reasonable that in such a case the owner of the land should be liable. But where, as here, the excavation is at some distance from the public way, the case is very different (*Binks adx.* v. *South Yorkshire and River Dun Navigation Company*).

Neglect of plaintiff to fasten gate opening on to railway.—Fawcett v. *York and North Midland Railway Company* (16 Q.B., 610), was cited in *Haigh* v. *London and North Western Railway Company*, where pony strayed on to line, and was killed. The evidence was that plaintiff's practice was to fasten gates by a catch by day, and a lock by night only, and that defendants knew it. The gate might have been blown open by the wind. The Court of Queen's Bench thought that the plaintiff had the means of making the gate secure, and had not used them, and confirmed the defendant's verdict.

Company bound to leave gate shut where tramway adjoins railway.—In *Marfell* v. *South Wales Railway Company*, the defendants' railway ran for some distance parallel to a tramway, being separated from it by a fence, also their property, down to a point where the tramway crossed the railway. At this point the defendants had placed gates which could be shut, so as to separate the tramway from the railway, but which by plaintiff's evidence never were shut. The plaintiff was licenced by defendants, on payment of a certain toll, to use the tramway with trucks and horses, one of which, alarmed at an approaching train, swerved from the tramway through one of the open gates on to the railway, and was killed by the engine. It was found that there was no negligence on plaintiff's part, but on defendants' in leaving the gate open; and it was held *per Williams* J., and *Byles* J. (Erle J.C. *diss.*), that the plaintiff had a right to expect ordinary care and diligence in keeping the gate shut, and that the defendants were liable for the value of the horse. And per *Curiam the* 8 *and* 9 *Vict. c.* 20, *s.* 68, *which imposes on railway companies the obligation to fence as against adjoining owners, does not apply to cases like the present, where*

adjoining land belonged to company. And per *Byles* J., "Suppose the defendants to be owners of a meadow, in which there is a deep chalk pit, fenced round by them to prevent cattle falling in, but with a gate in the fence to be used only by the defendants when they should desire to remove chalk from the pit. Suppose the defendants for reward to take in cattle to agist in that meadow the same question arises, Are the defendants under any obligation to exercise any degree of care in the use of the gate? It is clear on the authorities, that they are in the supposed case bound to exercise care in the use of the gate, and are responsible if they leave the gate open."

Sheep killed by a train.—In *Besant* v. *the London and South Western Railway Company*, the plaintiff was a farmer having land adjoining the defendants' line, and feeding his sheep on turnips. For this purpose he put them into a fold of which three sides were formed by hurdles, whilst a quickset hedge and a small ditch belonging to the railway made the fourth side. In the night the sheep got through the railway hedge on to the line, and 25 of them were killed. Mr. Baron *Martin*, in summing up, observed that by the Act of Parliament a duty was cast upon the railway company of making, keeping, and maintaining a proper fence between the line and the adjoining fields, for the words were, "That the company shall at all times make and maintain sufficient posts, rails, hedges, ditches, and mounds, or other fences, for separating the land, for the accommodation of the owners and occupiers of the lands adjoining the railway, and to prevent the cattle of the owners from straying thereout." The question in this case was whether this was such a fence. If sheep strayed in search of food, one would suppose they would go where there was plenty of food, and not upon a barren railway line. *Was there any proof of negligence in the plaintiff in not placing hurdles to protect the sheep from the hedge, instead of using the hedge as one fence of the fold?* If not, the other defences failed, and the company would be responsible. It was the duty of the company, and not of the plaintiff, to put up a sufficient fence for the purpose of preventing the sheep from straying. Why did the sheep stray? Was it not from the fence being insufficient? The jury must try the question as men of common sense. Probably the sheep were alarmed by a dog, for sheep were not straying animals. The jury found a verdict for the plaintiff, damages £30, in addition to the £20 paid into court, and a rule for a new trial was refused.

CHAPTER V.

DANGEROUS ANIMALS.

Wilful negligence on part of plaintiff subject of special plea.—It is said that the fact of the plaintiff having brought the injury on himself by wilfully going within reach of the animal, after warning of its mischievous nature, must, if a defence, be *specially pleaded* (*May* v. *Burdett.*)

Bull baiting and cock fighting.—Under 12 and 13 Vict. c. 92, s. 3, whereby "every person who shall keep, or use, or act in the management of any place for fighting or baiting any bull, &c., shall be liable to a penalty," &c., "and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, &c.," "or other animal as aforesaid, shall forfeit and pay," &c.; this last offence *can only be committed in a place so used as mentioned in the former part of the section* (*Clarke* v. *Hague*).

Depasturing a vicious horse.—Under the provisions of a local act, certain persons were empowered to make bye-laws for the regulation of the Common Parishes within the borough of Beverley. Among others they made a bye-law to this effect: "If any person shall stock or depasture or attempt to stock or depasture any bull, or entire or *vicious horse* .... on any part of the said common pastures, then, and in every such case, the person or persons so offending, and the owner or owners of the said stock or cattle, shall respectively forfeit and pay for every such offence the sum of £5 to be levied and recovered according to the form of the statute in that behalf." It was held that this bye-law was divisible, and that although the latter part as to the owners of the animal was bad, the former part was good, and therefore that a person who depastured a vicious horse upon the common pastures might be ordered to pay the £5 penalty (*Reg. on Prosecution of Beverley Common Pasture Masters* v. *Lundie*).

Fighting cocks in a place not set apart for the purpose.—In *Morley* v. *Greenhalgh*, where the evidence proved that several cocks were fought on a certain day at a stone quarry, but did not show that in any other instance cocks had been brought there for that purpose, the Court of Queen's Bench held that *Clarke* v. *Hague* applied, and that the 12 & 13 *Vict.* c. 92 sec. 3 was "limited as there applied. If that was so, then this stone quarry was not a place kept or used for the purpose; for the words 'kept or used' were synonymous in the context, and meant a place kept and intended to be used for such a purpose. It was no offence under the statute, therefore, to assist in fighting cocks,

unless it was at such a place. Being so, the conviction could not be supported."

Cruelty to animals.—A cock is "a domestic animal" within the interpretation clause of the 12 and 13 Vict., c. 92, so as to render any person cruelly ill-treating it liable to the penalty imposed by sec. 2 of that act. Here spurs had been put by the appellant on a cock to enable it to fight a disabled cock (*Budge* v. *Parsons*).

CHAPTER VI.

WATER.

Lands gained from the sea.—In *The Attorney General* v. *Chambers, &c.*, the Crown claimed to have the medium line (the boundary of the rights of the Crown on the sea-shore) laid down as it would have existed but for artificial causes; and it was held on appeal by Lord Chancellor *Chelmsford* that lands imperceptibly gained from the sea by a party's lawful use of his own land, belong to the owner of the land adjoining, unless it can be shown that the operations were intended to produce this gradual acquisition of the sea-shore. And where a party claimed the sea-shore in front of his property, on the ground that he had turned his cattle upon the marsh, and that they had crossed the boundary separating the marsh from the sea-shore, and that he had done this for sixty years without interruption, it was held that where property is of a nature that cannot easily be protected against intrusion, and, if it could, it would not be worth the trouble of preventing it, mere user is not sufficient to establish a right (*ib*).

Incidents of the sea-shore.—The sea-shore below high-water mark, and without inhabitants, is an extra-parochial place, having a population less than two hundred persons within the meaning of sec. 6 of 18 & 19 *Vict.* c. 121 (*Reg. on proson. of Earl Derby* v. *Gee and Others*). Part of sea-shore between high and low-water mark is within and part of the adjoining county; so that the justices of the county have jurisdiction to take cognizance of offences committed therein, whether land be covered with water or not at the time the offence is committed. And *per Cockburn* C.J.: "It is clear upon the authorities, as also upon *Reg.* v. *Musson* (27 L. J., N.S., Q. B., 222), where it was distinctly held that such part of the sea was within the county, that the justices had jurisdiction to entertain this matter, and that that jurisdiction ought to be exercised" (*Embleton* appt. v. *Brown* resp.).

Property in accretions from a non-navigable river.—Accretions from the gradual change of the course of a non-navigable river, where there are no fixed boundaries, will become the property of the owner of the adjoining land (*Ford* v. *Lacey*).

No action lies for interception of water merely percolating through the earth.—By sec. 12 of 10 & 11 *Vict.* c. 17 (Waterworks Clauses Acts, 1847), powers for the execution of certain works are given; and it is provided that the undertakers shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers. In the execution of certain works authorized by

a local act incorporating that section, the appellants intercepted water which would otherwise have percolated through the strata of the earth into a well on the premises of the respondent, and drained off water which had accumulated in the well. On a complaint by the respondent before justices, in order to recover compensation for the damages she had sustained, the appellants were ordered to pay her a sum of money and costs. It was held by the Court of Queen's Bench that this order was wrong; for that inasmuch as no action will lie against the appellants in respect of either quantity of water, or supposing no act authorizing the execution of the works had been passed, the claim for compensation could not be sustained. *Chasemore* v. *Richards* [see *Law of the Farm*, p. 128] is an authority for showing that water which percolates through the earth is not a thing for the intercepting of which an action will lie; and therefore there was no cause of action in respect of the water which would have found its way into the well of the respondent; and on the second point, as to water which had reached and was in the well, *Acton* v. *Blundell* (12 M. & W., 324) is an authority (*New River Company* v. *Johnson*).

Chasemore v. *Richards* was carried by Writ of Error into the House of Lords. Mr. Justice *Wightman*, in delivering the unanimous answer of the learned judges to the questions submitted to them by the House, said that the question was whether the plaintiff could maintain an action against the Local Board of Health in respect of the water abstracted from the sources which supplied the river. It was impossible to reconcile such a right as the plaintiff claimed with the ordinary rights of landowners. *If such a principle were to be established, a man would not be able properly to drain his land without being subject to actions from all the mill-owners on a river near him, because he might thereby alter the flow of the rain-water.* They were unanimously of opinion *that the decision of the Court below was correct*, and that the plaintiff could not maintain the right he claimed to prevent the defendant taking the water.

Hence the owner of an ancient water-mill on a river has no right of action against an owner of land adjacent who digs a deep well on his land, and *thereby diverts the underground waters, not known to be formed into a stream*, flowing in a defined channel, which otherwise would have percolated into the river, although the landowner does not use the water for purposes connected with the land, but pumps it up and carries it off in pipes to supply persons living in the neighbourhood, many of whom had no right to use the water at all. The decision in *Dickenson* v. *The Grand Junction Canal Company* [see *Law of the Farm*, pp, 127, 129, 130, 137] was questioned.

Water escaping from railway-cuttings into a mine.—A railway company is responsible for injuries sustained by reason of water escaping from a stream in flood-time, or collected from rain falling on the railway, and flowing along a cutting of the railway, and percolating through the substratum into mines beneath, although such mines had not been worked at the time of the formation of the railway; and such damage is the subject of an action, and not the subject of compensation

under the compensation clauses (*Bagnell* v. *London and North Western Railway Company*).

Working mines under water-course.—The owner of freehold lands and his lessee will be restrained from working mines under a water-course, otherwise than in a manner not likely to prevent the plaintiff from enjoying an uninterrupted flow of water to his works (*Elwell* v. *Crowther*).

Cattle drinking stagnant water improperly emptied on to land.—In *Baker* v. *Strong* (*Veterinarian*, June, 1861), the plaintiff recovered before *Wightman* J. £80 damages against the defendant for the loss of cattle which had drunk the stagnant water which the defendant had emptied through a trench from his land into a pond on plaintiff's farm, from which the plaintiff's cattle were accustomed to drink. The defence was that the water was not stagnant, and that the cattle died of lung disease.

Supplying horses with water from a public fountain.—A local board of health, empowered by their private act to supply a town with water at certain rates, supplied an ornamental fountain (which had been presented to the town by one of the inhabitants, and erected in one of the public streets) with water for the use of cattle in the cattle market on market days, *and for horses, if yoked, when passing to and fro.* The board had a fixed charge per horse for water supplied to persons keeping horses, who might choose to have water laid into their stables. The respondent, in order to evade payment of this charge, *took his horses from his stable to the fountain to drink.* Upon a complaint against him for so doing, under the Water Works Clauses Act, 1847, sec. 59, which enacts that "every person who, not having agreed to be supplied with water by the undertakers, shall take any water from any place containing water belonging to the undertakers other than such as may have been provided for the gratuitous use of the public, shall forfeit," &c.; the magistrates being of opinion that the local board had no power to erect a fountain in the public highway except for the gratuitous use of the public, and that therefore the water supplied to such fountains came within the exception in the above clause, refused to convict. It was held by the Court of Common Pleas that the decision of the magistrates was wrong; for that, whether the fountain were a public nuisance or not, the board were at liberty to supply it with water on their own conditions. And *per Williams* J.: "It is clear, upon the facts here, that there was no unrestricted dedication to the public at large, and nothing in the act of parliament to work that result. Though there may be a dedication for a limited purpose to all, there cannot be a dedication to a limited part of the public on the principle which is established in *Poole* v. *Huskisson* (11 M. & W., 827), [see *Law of the Farm*, p. 71], and *The Marquis of Stafford* v. *Coyney* (7 B. & C., 257). The consequence is not that a partial dedication will operate as a dedication to all the public, but such dedication is simply void, and no dedication at all. And *per Byles* B.: "I am not sure that the use for which this water is supplied was not a public use. Anybody's cattle and yoke-horses may drink at it; and though the time at which the fountain may be used, and

the class of cattle and horses, which may use it are limited, it is not the less for the use of all the public (see *Rex* v. *Berenger*, 3 M. and S., 73). But that by no means justifies the respondent in using the water for other purposes than those to which the use is limited (*Hildreth* appt. v. *Adamson* resp.)—30 L. J. (N.S.), M.C., 204.

Conveyance of right of continuance of culvert with farm.—By permission of the tenant for life of farms A and B, the defendant many years ago made a culvert from a brook, which in its natural course flowed to farm A for the purpose of getting water for his own premises, and for farm B. The culvert, which carried off nearly all the water from the brook, commenced in some lands of the defendant, which were bounded by the brook, and then passed through farm B, where a portion of the water was drawn out of it by means of a small pipe for the use of farm B. The rest of the water, viz., the larger portion, flowed on down the culvert, which, after traversing farm B, ended in other premises of the defendant, where the water was consumed. In September, 1856, the then owners of farms A and B conveyed a farm, B, in fee to the defendant, together with all waters and watercourses appertaining to the premises, or used, occupied, or enjoyed with the same. He afterwards conveyed farm A to the plaintiff, with all waters and watercourses. It was held in the Exchequer Chamber affirming the judgment of the Queen's Bench, that as against the owner of farm A the words of the conveyance of farm B were sufficient to convey to the defendant the right to the continuance of the culvert and to the accustomed flow of water down it, and that his right was not limited to the taking so much of the water as had heretofore been used for the purposes of farm B (*Wardle* v. *Brocklehurst*).

Condition under which tenant for life received compensation for loss of pond which worked his mill.—A pond which supplied a stream by which a flour-mill was worked, was purchased by the Ordnance under the Defence Act, 1842. The water being diverted, the tenant for life of the mill claimed compensation; and before an award was made, he erected a steam-engine and suitable buildings for the mill, expending thereon £1,300. Compensation amounting to £920 being awarded to him, the Court of Appeal, on a question from the Master of the Rolls, permitted this sum to be paid to the tenant for life, upon the understanding that the erection of the steam-engine and buildings was of a substantial and permanent nature (*In re Duke of Wellington's Settled Estates Act*).

Chapter VII.

SERVANTS.

Presumption that servant did not contract on behalf of master.—Although where a servant has once been held out by his master as having authority to pledge his credit, that authority cannot be withdrawn merely by orders to the servant; yet, without express evidence of actual notice to the tradesmen, there may be evidence from all the circumstances, as lapse of time, not sending in accounts for four years even to servant (and none to master), from which it may be inferred that the tradesman must have known that the servant had no such authority, and that he did not contract on the credit of the master. *Per Erle* C.J. (Home Circuit).—(*Stavely* v. *Uzzielli*).

No contract implied on part of master not to expose servant to great risk.—From the mere relation of master and servant, no contract can be implied on the part of the master to take due and ordinary care not to expose the servant to extraordinary danger and risk in his service. And *per Pollock* C. B.: "This is an attempt to nullify the decision of the Court in *Priestley* v. *Fowler* (3 M. & W., 1; 7 L. J., N.S., Ex., 42), and to enlarge the case in which persons in the relation of master or employer are to be made responsible for injuries incurred by those in their employment, who are in general much more able to judge of the probability and extent of the risk they run in the service than those who employ them. I think it highly expedient that the rule laid down in *Fowler* v. *Priestley* should be maintained, and not eaten up by exceptions" (*Riley* adx. v. *Baxendale and Another*).

Injury to servant working with master.—Where by the negligence of the master an injury is caused to a servant in the course of his employment, the master is liable, *although he was employed as a workman at the time*, and was working with the servant; and if one member of a partnership is guilty of such an act of negligence, and if it occurs in a matter within the scope of the common undertaking of the partnership, all the partners will be liable for the injury caused to the servant. And *per Curiam*: "If the defendant had been simply the fellow-workman of the plaintiff, the case would have come within the principle, and would be quite analogous to *Bartonshill Coal Company* v. *Reid* (3 Macq. H. L. Ca., 300), where it was decided that a servant sustaining an injury from the negligence of a fellow-servant engaged in the same employment, cannot recover against the common master. The present case is distinguishable in this important particular, that the defendant, although engaged jointly in the work of the mine, was also a co-

proprietor, and as such one of the plaintiff's masters; and this takes the case out of the before-mentioned rule, and calls for the application of a different principle. The doctrine that a servant, on entering the service of an employer, takes on himself, as a risk incidental to the service, the chance of injury arising from the negligence of fellow-servants, has no application in the case of the negligence of an employer. Though the chance of injury from the negligence of fellow-servants may be supposed to enter into the calculation of a servant on undertaking the service, it would be too much to say that the risk of danger from the negligence of a master when engaged with him in their common work enters in like manner into his speculation."

"From the master he is entitled to expect the care and attention which the superior position and presumable sense of the duty of the latter ought to command. The relation of master does not the less subsist because by some arrangement between the joint masters one of them takes upon himself the functions of a workman. It is a fallacy to suppose that on that account the character of a master is converted into that of a fellow-labourer. Though engaged with the plaintiff (Ashworth) in a common employment, Walker did not the less remain the master of the plaintiff and the partner of the co-defendant Stanwix. This being so, it follows that Stanwix must be liable in respect of the negligence through which injury has arisen to the plaintiff, as the relation of partner subsisted between Walker and Stanwix; and as the negligence was in a matter within the scope of a common undertaking, we think that Stanwix is equally liable with Walker. That a partner is liable for the negligence of his co-partner when engaged in the business of the partnership is not only clear in principle, but it is established by the case of *Moreton* v. *Hardern* (4 B. & C., 223), in this court, where the proprietors of a stage-coach were held liable with a third for the negligence of the latter, by whom the coach had been driven. Now it has never been doubted that for personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable. Personal negligence is clearly established against Walker; and it being admitted that the defendant Stanwix was his co-proprietor and partner, the latter must be held to be jointly responsible in respect of such negligence, and is therefore liable in this action" (*Ashworth* v. *Stanwix and Walker*).

Non-liability of master for injury to servant from negligence of fellow servant.—The doctrine in *Priestley* v. *Fowler* (3 M. & W., 1; and 7 L. J., N.S., Ex. 42) that a master is not liable for an injury to his servant arising from the negligence of a fellow-servant, *provided he has taken due care to provide proper machinery and competent servants*, was upheld in *Searle* v. *Lindsay and Others*.

Stranger helping servant.—If a stranger, invited by a servant to assist him in his work, is, while engaged in giving such assistance, injured by the negligence of another servant of the same master in the course of his employment, the stranger cannot hold the master responsible. The stranger, by volunteering his assistance, cannot impose upon the master a greater liability than that in which he stands towards his own servant; and if the master takes care that his servants are persons of

competent skill and ordinary carefulness, he is not liable for any injury that one of them may receive from the negligence of another. This case affirmed the authority of *Degg* v. *The Midland Railway Company* (1 H. & N. 773, and 26 L. J. (N.S.) Ex. 171), and the decision of the Queen's Bench was affirmed (*Potter* v. *Faulkner*).

Proof of well-defined negligence required.—In an action for an injury occasioned by a defendant's negligence, *e. g.*, negligent driving, the plaintiff, to warrant the judge in leaving the case to the jury, must *give proof of well-defined negligence*, and not merely some evidence of negligence on the part of the defendant; and where the evidence given is equally consistent with there having been no negligence on the part of the defendant as with there having been negligence, it is not competent for the judge to leave it to the jury to find either alternative; such evidence must be taken as amounting to no proof of negligence. It had been previously held, in *Pigott* v. *Eastern Counties Railway Company* (3 C. B., 229), which was referred to in the plaintiff's argument, but not noticed in the judgment, that the fact of the premises being fired by sparks from a passing engine is *primâ facie* evidence of negligence, rendering it incumbent on the company to show that some precautions had been adopted by them reasonably calculated to prevent such accidents (*Cotton* v. *Wood*).

Master responsible for wilful conduct of servant if within scope of his employment.—It was held by the Exchequer Chamber (*Wightman* J. *diss.* and *Crompton* J. *dub.*), affirming the judgment of the Court of Exchequer, that a master is responsible for the negligent act of his servant, notwithstanding that it be done wilfully, and contrary to express orders, if it be done within the scope of his employment, and in executing the matter for which he is engaged. Here the omnibus-driver of the defendant's had wilfully, and contrary to express orders from his master, pulled across the road to obstruct the progress of the plaintiff's omnibus, and in so doing injured one of the plaintiff's omnibus horses. The reason he gave was that he wanted to serve the plaintiff's driver as that person had served him. And *per Williams* J.: "If a master employs a servant to drive and manage a carriage, the master is, in my opinion, answerable for any misconduct of the servant in driving or managing which can fairly be considered to have resulted from the performance of the functions entrusted to him, and especially if he was acting for his master's benefit, and not for any purpose of furthering his own interest, or for any motive of his own caprice or inclination"—(*Limpus* v. *London General Omnibus Company (Limited)*.)

Contract with bailiff within Statute of Frauds.—Where A, on July 20th, made proposals in writing (unsigned) to B to enter his service as bailiff for a year, and B took the proposals and went away, and entered into A's service on July 24th, it was held by the Court of Exchequer that this was a contract on the 20th not to be performed within a year from the making thereof, and within the 4th section of the Statute of Frauds (*Snelling* v. *Lord Huntingfield*).

A previous decision in the County Court is conclusive as to the question if brought by summons before justices.—A servant in husbandry

being hired for a quarter of a year, entered the service and was discharged before the end of the quarter; she immediately sued her master in the County Court for discharging her without reasonable cause, and a verdict was given for the defendant. After the quarter had elapsed, she took out a summons before justices against the defendant to recover the quarter's wages. It was held that the question to be decided was essentially the same in the two courts, viz., whether the discharge was wrongful, and that the decision in the County Court was conclusive between the parties. And *per Cockburn* C. J.: "It was admitted, and, indeed, could not be denied successfully, that the question raised by the plaint and particulars in the one case, and the complaint on oath in the other, was the same, viz., whether the discharge of the respondent was without just cause. Varying the form of clain, where the claim itself is the same, does not prevent the application of the rule of law to which reference has been made" (*Routledge* appt. v. *Hislop* resp.)

Jurisdiction of magistrates does not extend to bailiffs.—A person engaged by the owner of a farm from year to year, subject to a month's notice, and at a salary of 25s. per week, to keep the general accounts belonging to such farm, to weigh out the food for the cattle, to set the men to work, to lend a hand to anything if wanted, and in all things to carry out the orders given to him, is *not* a servant in husbandry within the section 3 of *Geo.* IV. c. 34, so as to be liable to conviction under that section for refusing to obey an order given to him by the owner of the farm. The appellant had thrown back a paper at the agent, declaring that he would not give information respecting the herd of Herefords at Cronkhill until a notice which had appeared in the Shrewsbury papers that the appellant was not authorized to receive money on behalf of the defendant was cleared up. The appellant had certain information requisite for identifying the calves, &c., partly in a book and partly in his head; but *per Curiam, Crompton* J., and *Hill* J., "The provisions in the act apply to persons engaged in *manual work*, whereas the appellant here was rather a steward or bailiff. The principal thing which he had to do, besides setting the men to work and weighing out the food for the cattle, was to keep the general accounts, and although he was also to make himself generally useful, that was only accessory to his principal work. If we held that he was a servant in husbandry, so as to be liable to be convicted in this way, we should have to look into the other question, as to whether he had been guilty of misconduct; but that is unnecessary, as we think he was not a servant in husbandry within the act of parliament" (*Davies* appt. v. *Baron Berwick* resp.)

Bonâ fide belief of servant that he may quit his place.—Although if a servant leaves his employment, or refuses to perform his own contract under a *bonâ fide* belief that he has a right to do so, he cannot be convicted under the statute; yet to entitle the servant to judgment on that ground on a case stated for the opinion of the Court, the facts must reasonably show that the desertion or neglect complained of was in pursuance of that supposed right, and it is not sufficient that it was merely possible that he acted under it (*Willett* appt. v. *Boote* resp.)

Contracts of service need not be for any specified time to give magis-

trates jurisdiction.—In order to give justices jurisdiction to hear a complaint as to the non-payment of wages, under the 20 *Geo.* II c. 19, s. 1, it is only necessary that the relation of master and servant should exist between the parties, and *the contract of service need not be for any specific time* (*Alice Taylor* appt. v. *Carr and Porter* resps).

Recovering a month's wages.—A menial servant, entitled under the hiring to a month's warning or a month's wages, cannot recover a a month's wages for having been improperly dismissed without a month's warning on the common *indebitatus* count for work or labour, but must declare specially. And *per Curiam*: "The month's wages are to be paid, not for the bygone services, but for the improper dismissal of the servant. *Eardley* v. *Price* (2 N. R., 333) broke in upon the rules of law, perhaps in order to do what happened to be justice in that particular case. *Archard* v. *Hornor* (3 C. & P., 349), which was afterwards confirmed by the Court of Queen's Bench in *Smith* v. *Hayward* (7 Ad. & E., 544), and also by this court, governs this case. It is not broken in upon by *Smith* v. *Kingsford* (3 Scott, 279), which was decided on the ground that there was no dissolution of the contract of hiring. The contract in the present case is that the service is for the year, but the master is at liberty to dismiss the servant by giving her a month's wages or warning." And *per Alderson* B.: "When we say that the servant is to have a month's warning or a month's wages, it is meant that the payment to be made for the dismissal without warning is to be by way of composition, and that the amount is to be equal to a month's wages" (*Fewings* v. *Tisdal*).

Gardener only entitled to a month's wages.—A gardener with £100 a year and house, and two apprentices at £15 a year, is still only a menial servant, and entitled, even after four years' service, to only a month's warning. And *per Abinger* C.B., though he did not live in the house, or within the curtilage, he lived in the grounds on the domain (*Nowlan* v. *Ablett*).

No contract for services.—Where services have been rendered without any express contract for wages, but with board and lodging and other benefits (here to keep fowls, bees, &c., for her profit, although she paid for their food herself), it was ruled by *Martin* B. that a contract to pay for such service is not to be implied (*Foord* v. *Morley*.

Chapter VIII.

CONVEYANCE OF HORSES AND CATTLE.

"Just and reasonable" condition with respect to a dog under the Traffic Act.—A dog (although not specifically mentioned in the proviso as to the limit of compensation) is within the 7th section of the Railway and Canal Traffic Act, 1854 (17 and 18 Vict. c. 31). The plaintiff delivered to the defendants, a railway company, a dog to be carried, and signed this ticket: "Received the annexed ticket, subject to the following conditions: the company will not be liable in any case for loss or damage to any horse or other animal above the value of £40, or any dog above the value of £5, unless a declaration signed by the owner or his agent at the time of booking shall have been given to them; and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value declared. The company will in no case be liable for injury to any horse or other animal, or dog, of whatever value, where such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed £40, or any dog £5, the price of conveyance will, in addition to the regular fare, be after the rate of 2½ per cent. upon the declared value above £40, whatever may be the amount of such value, and for whatever distance the animal is to be carried." The value of the dog was £21, but the plaintiff made no declaration of its value, and paid only the regular fare 3s. The dog escaped from the train, and was lost without any negligence on the part of the defendants, and the plaintiff having sued the defendants for the loss, it was held by *Cockburn* C.J., and *Blackburn* J., first that the meaning of this ticket, the whole of which must be read together, was that if the value of a dog was above £5, and its value was not declared, and the extra price paid accordingly, the defendants would not be liable at all even for loss or injury caused by their own negligence, and that the condition was therefore within 17 and 18 Vict., c. 31, s. 7; secondly, that this condition was not "just and reasonable," inasmuch as the extra charge of 2½ per cent. (without proof to the contrary, which it lay on the defendants to give) appeared excessive and unreasonable; and thirdly, that the condition being void, although there was no negligence on the part of the defendants, the plaintiff was entitled to recover the full value of the dog against them as common carriers. It was held by *Wightman* J., that the different clauses of the ticket were separable, that the first condition meant that the defendants would not be liable beyond £5 for injury, however

caused, unless the value of the dog were declared, and that this was a reasonable condition, and afforded a good defence beyond £5, which sum the plaintiff was entitled to recover. The verdict was directed to stand for £21.

Error was thereupon brought by the defendants to reverse the judgment given by the Court of Queen's Bench for the plaintiff on a special case: and it was held (*diss. Wild* B.), reversing the decision of the court below, that the plaintiff was not entitled to recover, *Erle* C.J., and *Keating* J., being of opinion that section 7 of 17 & 18 Vict., c. 31, was confined in its application to cases where the loss or injury was occasioned by the neglect or default of the company, and had no bearing on such a case as the present, where the loss arose from pure accident, and that the company were exempt from liability by the terms of their contract. It was held further by *Erle* C.J., *Williams* J., *Channell* B., and *Keating* J., that assuming that the statute applied to this case, the conditions in the ticket were reasonable and just, and that they were not to be construed as meaning to exempt or as having the effect of exempting the company from liability for loss or injury occasioned by wilful misconduct on their part. And per *Erle* C.J., it is for a jury not for the judge to say, whether the percentage charged on the extra value declared in respect of any animal is reasonable (*Harrison* v. *London and Brighton and South Coast Railway Company*).

Contract of carriage with first railway, and second not liable for accident.—The plaintiff delivered cattle at a station of the Shrewsbury and Hereford Railway Company, to be conveyed to Birmingham, and signed a contract note with that company, one of the terms of which was that the company would not be subject to liability for any damage arising on other railways. The cattle were placed on a truck of defendants, lying at the station, and were conveyed in it along the Shrewsbury and Hereford line to Shrewsbury, and then on defendants' line to Birmingham. Between Shrewsbury and Birmingham the cattle were injured by the floor of the truck giving way, and it was held that as the contract of carriage was with the Shrewsbury and Hereford Company for the entire journey, the defendants were not liable (*Coxon* v. *Great Western Railway Company*).

Crowding cattle without leave into truck with another owner's.—*Martin* B. ruled that an action was maintainable by a person who hired a railway truck to put his nine cattle in, against another who crammed his two cattle in, and seriously injured the rest. The whole eleven seem to have been bought together, but there was a false representation by the defendant to the railway as to his right to have the truck (*Raynor* v. *Childs.*)

Railway company must be sued within county court district of principal place of business.—If a railway company injure a chattel (here a horse) of the plaintiff in County Court district A, the company cannot be sued for it in County Court district B, merely because it has a local station in district B, at which passengers are booked and goods received for carriage; for a railway company does not carry on its business within the meaning of the statute 9 and 10 Vict., c. 95, s. 60 at

every place where it has a station, but only at the principal office, where the directors meet, and the general business of the company is transacted. The case was decided on the authority of *Taylor* v. *Crowland Gas Company* (11 Ex. 1, and 24 L.J. (N.S.), Ex. 233), and *Adams* v. *the Great Western Railway Company* (30 L.J. (N.S.), Ex. 124), *Shiels* v. *Great Northern Railway Company*).

Just and reasonable contract under Railway, &c., Traffic Act.—In *McManus* v. *Lancashire and Yorkshire Railway Company*, it was held by the Exchequer chamber, *reversing the decision of the Court of Exchequer* (*Erle* J. *diss.*), that (1) *The Railway and Canal Traffic Act*, 1854 (17 and 1 *Vict.*, c. 31, s. 7), extends to cases where a special contract has been signed in conformity with the subsequent provision in the same section; and (2) that the contract above adverted to, contained a condition which is not just and reasonable within the above section, and is therefore void. *Williams, Crompton, Crowder, and Willes* J.J. considered, on the authority of *Peake* v. *North Staffordshire Railway Company* (27 L. J. (N.S) Q.B., 465), and the opinion of the late Chief Justice *Jervis* in *Simmons* v. *Great Western Railway Company* (18 C. B., 805), that the company may make special contracts with their customers, provided they are just and reasonable. In reference to the second point, they remarked that "in order to bring the defendant within the protection of the special contract, it is necessary to construe it as including responsibility for loss occasioned, not only by all risks of whatever kind, directly incident to the transit, but also for that occasioned by the insufficiency of the carriages provided by the defendants, though occasioned by their own negligence or misconduct. The sufficiency or insufficiency of the vehicles by which the company are to carry on their business, is a matter, generally speaking, which they and they alone can and ought to have the means of fully ascertaining; and it would, we think, be not only unreasonable, but mischievous if they were to be allowed to absolve themselves from the consequence of neglecting to perform properly that which seems entirely to belong to them as a duty. It is unreasonable that the company should stipulate for exemption for liability from the consequences of their own negligence, however gross or misconduct, however flagrant, and this is what the condition under consideration professes to do."

Estoppel by wilfully false statement of value of horses at time of contract for their carriage.—It was held by the Court of Exchequer, that the plaintiff having made a wilfully false statement to a railway company, as to the value of the three horses (stated to be less than £10 each) for the purpose of inducing, and having thereby induced the defendants to enter into the contract for their carriage, was not at liberty to show their real value, in order to obtain compensation above the amount paid into Court (£25). And *semble* that the declaration of the value of the horses formed no part of the contract, and that even if it were part, it did not render the contract a conditional contract; and also that the stipulation that the horses should be carried entirely at the owner's risk was not unreasonable and void within the meaning of the 17 and 18 Vict., c. 31 (*McCance* v. *London and North Western Railway Company*).

Chapter IX.

DISTRESS.

No detinue where tender made after impounding.—Detinue will not lie for goods impounded *damage feasant*, where tender of amends has been made *after* the impounding. And *per Pollock* C. B.: "In *Gulliver* v. *Cozens* (1 C. B., 788; 14 L. J. (N.S.) C. P., 215), *Maule* J. says, 'If a sufficient tender had been made before the impounding, the defendant would have been bound to restore them, otherwise not.' That is a clear and distinct proposition on the part of my brother *Maule*, that after impounding the distrainor is entitled to hold, notwithstanding a tender made afterwards; and it is not at all clear that the Lord Chief Justice did not mean, as the reporter has so construed him, tender before impounding. The authorities for so long a period have laid down the same thing, that I do not see how we can get over them. I confess I do not quite participate in my brother *Martin's* doubts; for I can well understand the tender after impounding may be like a tender after action brought, and I have a right to say 'do not tender' after I have called in the aid of the law. But *per Martin* B: "There is the law no doubt as decided, but it seems to me a very odd and absurd law. A valuable animal might be distrained for damage of an inappreciable amount, and yet I cannot find any way in which the owner is to get it back; and yet it surely cannot be that the animal is forfeited absolutely" (*Singleton* v. *Williamson*).

Impounder bound to know state of pound.—A person who distrains cattle *damage feasant* is bound, at his peril, to take care that the place in which he impounds them is in a fit and proper state, and is liable for the consequences if it is not. In an action for abusing sheep distrained *damage feasant*, by putting them into a pound which was in an unfit state, as the defendant well knew, the evidence was that some of the sheep died in consequence of the state of the pound, and that it was in an unfit and improper state. It was held that it was not necessary to leave to the jury explicitly the question whether the defendant knew the unfit state of the pound, for that he was bound to know it; and moreover, as it was obvious, he must be taken to have known it, and a verdict for the plaintiff was supported (*Bignell* v. *Clark*).

Wrong distress damage feasant.—The plaintiff was owner of close A, the defendant was owner of closes B and C; between A and B there was a fence, which, as against the owner of A, the owner of B was bound to keep in repair, but which he had neglected to do; between B and C there was a sufficient fence. The cattle of the plaintiff strayed at

from A through a gap into B, and then, breaking down the fence between B and C, were distrained by the defendant, as he alleged *damage feasant* in C. It was held by the Court of Exchequer, in an action of trover to recover the cattle, that the defendant had no right to distrain them, as the first wrongful act had been committed by himself in leaving the fence between B and A insufficiently repaired, the natural result of which wrongful action was the damage complained of, and that the jury were properly directed that the state of the fence between B and C., and whether or no the cattle were *damage feasant*, was immaterial. The case was tried at Carlisle, and the plaintiff was the owner and occupier of a close bounded on the north by the river Trent, and the defendant the owner of a close called Bridge Green, which was separated from the plaintiff's close by the river. On the defendant's side of the river there was a fence, which by an award of the Inclosure Commissioners, made in 1815, the owner of Bridge Green was directed to keep in repair, but which at the time in question was not in repair. The defendant was also owner of a corn field which was separated from Bridge Green by a fence, which was proved at the trial to be a good and sufficient fence. The cattle were alleged to have got over the river through a gap into Bridge Green, and then to have broken down the fence between that close and the corn-field, in which latter close they were distrained by the defendant, where, as he alleged, they were *damage feasant*. *Wilde* B. told the jury that if they believed this was the way the cattle got into the corn-field, it was quite immaterial what was the state of the second fence, or whether the cattle were *damage feasant*, for that, under these circumstances, the original fault having lain with the defendant, he had no right to distrain, and the jury found for the plaintiff, and the rule for a new trial was discharged (*Singleton* v. *Williamson*).

8 *Tender not too late if made after impounding and before sale.*—An action is maintainable upon the equity of the statute 2 *Wil.* & *Mary*, stat. 1 c. 5 s. 2, for selling goods seized under a distress for rent, where a tender of the rent and expenses has been made before the sale, and within five days of the seizure, although after impounding; *Ellis* v. *Taylor* is therefore overruled. And *per Curiam*: "The case most relied upon by the defendant was that of *Ellis* v. *Taylor* (8 M. & W. 415, and 10 L. J. (N.S.) Ex 462), in which the Court held, upon the authority of two previous cases, that a tender after impounding a distress for rent was too late. The two cases were *Thomas* v. *Harris* (1 M. & G. 695, 9 L. J. (N.S.) C. P. 308), in which Mr. Justice *Maule* differed from the other judges; and *Ladd* v. *Thomas* (12 Ad. & E. 117, and 9 L. J. (N.S.) Q. B. 345). Undoubtedly those cases are authorities upon the point. But, notwithstanding those decisions, the judges of the Court who heard the argument were unanimously of opinion that upon the equity of the statute of *Wil.* & *Mary*, before referred to, an action is maintainable for selling goods distrained for rent after tender of the rent and expenses, though the tender be made after the impounding." And *per Crompton* J.: "The Court, in *Ellis* v. *Taylor*, seems to have assumed that because it had been decided that the defendant could lawfully keep the goods, notwithstand-

ing a tender, if it was after impounding, he had therefore a right to sell. The case of *Glyn* v. *Thomas* (11 Ex. 870, & 25 L. J. (N. S.) Ex. 125) carried the law far enough against tenants" (*Johnson* v. *Upham*).

Proper person to receive tender of rent.—On distraining for rent, the man left in possession on the premises (being other than the person holding the warrant from the landlord to distrain) has no authority in law to receive the rent. Where, therefore, W. executed a warrant of distress, directed to him by the landlord, and left R on the premises in possession, and the tenant tendered the rent to R, who refused to receive it, the tenant knowing that R had not authority in fact to receive the rent, and that W had, and that he was within a reasonable and convenient distance of the premises, it was held that the tender was invalid. And *per Hill* J.: "If it were necessary to decide whether the bailiff employed to make a distress has authority to receive a tender, I should say he has, as there ought to be somebody who may be conveniently applied to by the tenant for the purpose of tender. *Pilkington's Case* (Cro. Eliz. 813) decides that when a bailiff goes with his master, who himself distrains, the bailiff has no authority to receive a tender; but I should agree with the passage already alluded to in *Gilbert on Distress*, pp. 82, 83, that where the bailiff is authorised to distrain, and distrains without the personal intervention of the landlord, he would be authorised to receive the rent. But it by no means follows that because a tender may be well made to the bailiff or broker authorized to distrain, a tender may be made to any person assisting in the distress, and it would be a monstrous proposition to say that the rent might be paid to any irresponsible person who happened to be left by the bailiff in temporary possession of the goods. The case of *Smith* v. *Goodwin* (1 Nev. & M. 371, and 4 B. & Ad. 413; 2 L. J. (N.S.) K. B. 192) was relied upon for the plaintiff as assuming the proposition for which he contended, that the person left in possession had authority to receive the rent; but in that case the rule was refused, on the ground that the tender to the landlord himself was good. The short dictum as to the tender to the man in possession was wholly unnecessary and beside the question (*Boulton* v. *Reynolds*).

Rule with regard to distraining beasts of stranger for tenant's rent.—"With regard to a stranger's beasts on a tenant's land, the following distinctions are taken: if they are put on by consent of their owner, they are distrainable immediately afterwards for rent arrear by the landlord; and if the stranger's cattle break the fence, and commit a trespass by coming on the land, they are distrainable immediately for the tenant's rent, as a punishment to the owner of the beast for the wrong committed through his negligence. If, however, the lands were not sufficiently fenced, the landlord cannot distrain them till they have been *levant et couchant* on the land, which is held to be one night at least; in this case the law presumes that the owner may have notice whether his cattle have strayed, and it is his own negligence not to have taken them away. While if the lessor or his tenant were bound to

repair the fences, and did not, and thereby the cattle escaped into their grounds, without default in the owner, in this case they are not distrainable for rent until actual notice is given to the owner that they are there, and he neglects to remove them; for the law will not suffer the landlord to take advantage of his own or his tenant's wrong" (*Kerr's Action at Law*).

"*Reasonable time*" *for bringing back cattle which had strayed.*—*Goodwyn* v. *Cheveley* was an action of trespass tried before Mr. Baron *Bramwell* at Guildford, when the jury, under his lordship's direction, found a verdict for the defendant, and a rule was obtained to set aside the verdict. The plaintiff was driving 36 cattle along a highway in the dark, when 23 of them strayed through a large gap into one of the defendant's fields, who, finding them there, caused them to be impounded. The plaintiff, after securing the other cattle, went in search of those that had strayed, and then discovered what had happened to them. The evidence went to show that an hour had elapsed before the plaintiff went to drive them out of the defendant's field, and before they were impounded, during which time the cattle were browsing the defendant's grass. The learned judge told the jury that the delay was unreasonable, and that the plaintiff ought to have driven the beasts out of the field as soon as he had discovered that they had strayed. The Lord Chief Baron, Mr. Baron *Martin* and Mr. Baron *Watson*, in giving judgment, said that the defendant was in the wrong in having his fences out of repair, and if he knowingly or negligently left gaps he must put up with the consequences arising therefrom. It was the nature of cattle to stray, and no human care could guard against their doing so; therefore the rule for a new trial would be made absolute. They thought *it was not a question of law for the opinion of the judge, whether the plaintiff's men had removed the cattle in reasonable time, but a question of fact for the jury on the evidence.* Baron *Bramwell* said that he was still of opinion that the plaintiff ought to have gone at once and got his cattle out of his field. It was no excuse for not doing so to say that while he was performing that work the cattle in the highway might have strayed away. The plaintiff had left his cattle browsing at the defendant's expense for more than an hour, and it was very unreasonable and improper that he should have done so. The majority of the Court being in favour of the plaintiff, the rule was made absolute for a new trial. *Bramwell* B.'s direction had been in substance this—that if more time was taken to distrain the cattle than was reasonably necessary for that purpose, and that purpose only, and then the cattle were not removed within a reasonable time, the defendant had a right to distrain them, without reference to any other extrinsic circumstances whatever. The case was arranged.

Distress rendered illegal by improper time of taking it.—In two cases, in one of which the distress was taken at nearly eight o'clock in the evening, when by the almanac the sun set just after seven, and in the other it was taken between two and three o'clock on the morning of a day on which, by the almanac, the sun rose shortly before half-past four, and there was no other evidence upon the point, nor any

evidence as to whether in either case it was dark when the distress was taken, but the jury in both cases found that it was taken between sunset and sunrise, it was held that the evidence was sufficient to sustain that finding, and that the distresses therefore were illegal (*Tutton* v. *Darke*; *Nixon* v. *Freeman*).

Improperly working a distress.—If a distrainor abuses a distress by working it, the owner may interfere and prevent it, and no action can be maintained against him for pound breach or rescue. Here, after three horses of the defendant, who was a butty-collier under the Messrs. Hickman, tenants to the plaintiffs, of a colliery at a surface rent, and also at a mining rent, had been included in a distress for colliery rent levied on the Messrs. Hickman, and removed to a stable half a mile off, and notice given that they were impounded there, the plaintiffs' appraiser directed the bailiffs to bring two of them to work at being let down into the pit, and helping to get up timber from it. One of the horses was locked in a moveable stable on the pit bank, and the other was about to be let down, when the defendants took forcible possession of both, breaking the lock of such stable, turned both loose, and then took them away. The plaintiff's got a verdict of £60 treble damages under stat. 2 *Wil.* & *Mary* sess. 1 c. 5, with leave reserved to the defendant to enter a verdict for himself on the ground that neither count of the declaration was proved, the rescue being after the impounding, and after the plaintiffs had taken the distress from the pound for an unlawful purpose; and the verdict was entered for the defendant. And *per Wilde* B.: "Here there was a plain, palpable misuse of the distress of the most aggravated kind. I think, under the circumstances, the defendant was perfectly justified in interfering. I think, therefore, the rescue is not made out. With regard to the pound breach, it seems to be perfectly plain that directly the distrainor has taken the animals out of the pound for the purpose of using them it cannot be said that they are any longer under the protection of the law, nor in any artificial sense can they be considered as being in the pound contrary to the fact." And *per Pollock* C.B.: "If a hunter is distrained and ridden hunting, I think the owner might retake him." And *per Martin* B.: "If a lot of sheep had been distrained, and the distrainor was about to kill them, the owner would have a right to interfere" (*Smith and Another* v. *Wright*).

Distress after death of tenant.—T being tenant-at-will at a yearly rent, died leaving rent in arrear; the next day the lessor distrained on the premises, which were then occupied by T's servants; his widow came into occupation the day after, and subsequently took out administration to her husband. It was held that the distress was not justified under 8 Anne, c. 14, ss. 6, 7, as it was not made "*during* the possession of the tenant from whom the rent became due;" and *semble* that *Walker* v. *Giles* (6 C.B. 662, 18 L.J. (N.S.), C.P., 323) is still law as to the construction to be put upon similar deeds, and is not overruled by *Pinhorn* v. *Sonster*, (8 Ex., 763; 22 L.J. (N.S.), Ex. 266), and *Brown* v. *Metropolitan Counties Life Assurance Society* (28 L.J. (N.S.), Q.B., 236); and *per Mellor* J., "*Braithwaite* v. *Cooksey* (1 H. Bl., 467), is distinguishable be-

cause the tenancy did not expire with the death" (*Turner* v. *Barnes and Others*).

Unregistered transfer of growing crop good against execution creditor.—A creditor having agreed with his debtor to take a growing crop in satisfaction, and the *debtor* giving him a receipt for the amount of the debt as if for money paid on a sale of the crop, and the creditor having taken possession, it was held by *Wightman* J., that the transfer though not registered was good as against an execution creditor (*Newman* v. *Cardinal.*)

Setting off judgment obtained by tenant against rent due.—A tenant having obtained judgment and issued execution by *fi. fa.* and *ca. sa.* against his landlord, afterwards became indebted to him for arrears of rent and dilapidations; and it was held by *Wood* V.C., that the landlord was not entitled by injunction to restrain proceedings upon the judgment on the ground of set off. In this case, by agreement of January 23rd, 1860, the defendant Ulyatt agreed to become tenant from year to year to the plaintiff Maw, at the yearly rent of £210. The agreement provided that the tenant should hold the land from September 29th, 1859, and the house and building and homestead from March 25th, 1860, for one year, and so on from year to year, until six months' notice previous to Michaelmas in any one year. The agreement contained clauses as to cultivation, and as to consuming crops, &c., on the land, and also provided that on observing the conditions of the agreement, the tenant on quitting should be entitled to be paid for a seed and labour valuation by two valuers, one to be chosen by either party.

The defendant did not pay the first half year's rent, and the plaintiff distrained for it. The defendant then brought an action for excessive distress, on the ground that the plaintiff had agreed to pay him for certain repairs to be done on the premises, and to allow him to deduct the price of them out of the first half-year's rent, and recovered in this action and signed judgment for £30 damages, and £87 17s. 3d. or thereabouts for repairs, and £107 8s. costs. On March 25th 1861, another half-year's rent, £105, became due to the landlord, who sued for it, and signed judgment for want of a plea for £108 17s. 8d. debt and costs. These two judgments were by a Judge's order set off one against the other, leaving £116 9s. 4d. due to the defendant on his judgment. In February, 1861, the plaintiff gave the defendant notice to quit in September, 1861, which he did, leaving the half-year's rent then becoming due unpaid. He had also committed breaches of his agreement in ploughing up land, selling off crops, &c. The plaintiff then appointed a valuer of the dilapidations, and gave the defendant notice to appoint another, which he failing to do, the plaintiff appointed both, and they made an award, charging the defendant £199 in respect of dilapidations. It was admitted on the motion for an injunction, that this award did not strictly come within the terms of the agreement, so as to render the damages liquidated. In October 1861, the defendant issued a *fi. fa.*, under which the sheriff seized some houses and other goods of the plaintiff, and advertised them for sale. He also issued a *ca. sa.*, but this had not been put in execution. The

plaintiff thereupon applied to a Common Law Judge to set off the rent and damages for dilapidations against the judgment of the tenant, but this his Lordship held he had no power to do. The present bill was then filed charging that it was contrary to equity, that the tenant should proceed to execution on his judgment, or at all events so far as the same had arisen from a liquidated demand, while the sum of £105 for half-a-year's rent was due to the landlord, and the latter's claim for damages in respect of the dilapidations was unsatisfied, and asking on payment into court of the principal, interest, and costs due in respect of the judgment, and taking all such proceedings at law or otherwise, as the Court might direct, that the plaintiff might be at liberty to set off the half-year's rent of £105 so due to him, and all monies which might be due to him, in respect of dilapidations against the monies due to the tenant in respect of his judgment. The second and third paragraphs of the prayer asked that the defendant might be restrained by injunction from further proceeding on his judgment, whether by *fi. fa.*, *ca. sa.*, or otherwise; and that the other defendant the sheriff might be restrained from selling, &c.

On 17th October, 1861, an *ex parte* application was made to *Wood* V.C., who granted an interim order until the 4th of November, with liberty to issue a writ against the tenant in respect of the damages to the farm, and leave to serve notice of motion for an injunction for the first day of term. This writ was issued, and when an injunction was moved for, it was argued for the defendant that the judgment having once accrued could not be affected by any after acquired right of the debtor; and it was submitted in reply, that the case came within the words of Lord Cottenham in *Rawson* v. *Samuel* (Cr. & Ph., 161, 179, 10 L.J. (N.S.), Ch. 214). But per *Wood* V.C.: "It is clear that an injunction cannot be granted. If the party was without a defence at the time the judgment was signed, a right subsequently accrued could not be set off. A judgment debtor could not say, 'I will wait till another debt accrues.' There was nothing in the case to show that a set off existed either in law or at equity at the time of judgment being obtained. Under these circumstances, it was necessary to consider the question of the solicitor's lien. The motion must be refused with costs" (*Maw* v. *Ulyatt*).

Interpleader.—Where an execution has been levied, and a landlord makes a claim upon the sheriff for rent, which the execution creditor has not expressly disputed, whether as regards the amount of rent due (on the construction of the lease), or as regards the liability of the property which has been seized to distress, the sheriff is not entitled to an interpleader, at all events unless the landlord claims any part of the property; and *semble* that in no case where the claim is for rent can there be an interpleader (*Bateman* v. *Farnsworth.*)

Distress an affirmation of tenancy.—A landlord by distraining for rent affirms the continuance of the tenancy up to the day when the rent so distrained for became due. A tenant under a lease at a quarterly rent

of £80 payable quarterly, with a clause for re-entry if the rent should be in arrear for 21 days, was in arrear £60 for three quarters at Michaelmas; for these arrears his landlord on October 2nd took a distress, which on October 16th realised £27 6s., leaving due £32 14s., there being no sufficient distress upon the premises. On November 2, the landlord (under the Common Law Procedure Act 1852, s. 210) served a writ of ejectment. It was held by the Court of Common Pleas, that the landlord had affirmed the continuance of the tenancy up to Michaelmas, and that as half-a-year's rent was not in arrear at the time the writ was served he could not recover. And per *Curiam*: "The statute 4 Geo. II., c. 28, s. 2, for which the 210th section of the Common Law Procedure Act is substituted, enables a landlord to proceed under it only in cases where there shall be half-a-year's rent in arrear, and a right to re-enter for the non-payment thereof *i. e.*, for non-payment of half-a-year's rent, see (*Doe dem. Dixon* v. *Roe*, 7 C.B., 134). In the present case, therefore, no right to re-enter in respect of the rent due for the half-year which ended at Michaelmas could be relied on, because it never was in arrear for 21 days. But it was contended that at all events a complete title accrued on the 21st day after the Midsummer rent became due, and *Doe* v. *Shawcross* (3 B. & C., 752) was cited."

"That case certainly shows that in cases to which the Act applies, the title accrues at the time when the demand of the rent ought to have been made at common law. But the statute authorises the service of the writ 'as often as it shall happen that one half-year's rent shall be in arrear;' and in the present case, there was no such arrear at the time the writ was served. The case therefore is not within the Act, unless the words 'shall be' ought to be construed "shall have been.' But there is nothing unreasonable in supposing that the statute meant to confine its operation to cases where the tenant was six months in arrear at the very time when the landlord had recourse to this statutory remedy. It is not, however, necessary for us to decide this point, because we are clearly of opinion that the plaintiff waived any breach of the condition of re-entry, which accrued earlier than Michaelmas, by distraining for the Michaelmas rent. Had the distress been confined to the rent due at Midsummer, it would not have waived the forfeiture for the non-payment of that rent, as appears by the case of *Brewer* v. *Eaton* (3 Doug. 230), which was cited for the plaintiffs. But the distinction is plain, that though a distress in respect of rent due accruing before the breach of condition is no waiver of it, yet a distress for rent accruing after such breach, with notice of it, is a waiver of it, because such a distress affirms and admits the continuance of the tenancy up to the day when the rent so distrained for became due. If it were otherwise the plaintiffs would by this action establish their right to the possession of the demised premises, and to deal with the defendant as a trespasser at a date anterior to Michaelmas, although the plaintiffs by their distress have treated the defendant as having been rightfully in possession as tenant up to that date" (*Cotesworth and Another* v. *Spokes*).

Sheriff not entitled to poundage.—Where after seizure of goods under writ of execution, but *before sale*, the judgment and subsequent proceedings are set aside for irregularity, and the goods are therefore not sold, the sheriff is not entitled to poundage (*Miles* v. *Harris*).

Measure of damages in case of trespasser ab initio.—Where a landlord distrains for rent actually due in such a manner that he is throughout a trespasser *ab initio*, and does not merely become such by reason of an irregularity subsequent to entry, the measure of damages in an action of trespass brought against the landlord by the person so distrained upon is the full value of the goods taken, and the jury, in estimating the damages, ought not to make any deduction from such value in respect of the rent which was actually due. And *per Blackburn* J.: "Where a party sues for a taking of his goods, and the defendant had an interest in the goods, there is very little doubt that the defendant may deduct the value of that interest from the damages of the taking. That was, I think, the principle proceeded on in *Proudlove* v. *Twemlow* (1 Cr. & Mee 326) and in *Chinery* v. *Viall* (29 L. J., N.S., Ex. 180). Here the landlord was a trespasser *ab initio*, and did not merely become so by an irregularity after entry so as to be protected by the statute of *Geo.* II. The case of *Keen* v. *Priest* (4 H. & N. 236) is clear against my ruling, and, as I now think, rightly so" (*Attack* v. *Bantell*).

CHAPTER X.

HUSBANDRY COVENANTS.

Custom of the country.—The law will imply a promise on tenant's part to cultivate his farm in a husband-like manner, and according to the custom of the country in which it is situated, *unless the express agreement is inconsistent* with the custom. When a custom of the country is proved to exist, it is to be considered as applicable to *all tenancies in whatever way created*, whether verbal or in writing, unless expressly or impliedly excluded by the written terms themselves (*Wilkins* v. *Wood*).

Effect of covenant not to carry away hay and straw, &c., under a penalty.—On a covenant in a farming lease, that the lessee would not sell or carry away from the demised premises any hay, straw, or manure, which should be grown or produced thereon, without the consent of the lessor first had and obtained, under the increased rent of £10 for every ton so sold or carried away, and so in proportion for any greater or less quantity, but that the lessee would eat and consume the hay and straw of his cattle; the breach alleged was that the lessee, without the consent of the lessor, did sell a large quantity of hay and straw grown and produced on the demised premises to wit, &c. It was held by the Court of Exchequer, that the covenant was one covenant, which gave the lessee the right to sell the hay, &c., on payment of the increased rent, and that therefore the breach was not well assigned. And per *Bramwell* B., "The expression is first, that he should not sell or carry away from the demised premises any manure, and so forth, but it is said under an increased rent of £10. That is to say, he shall not do it, except on liability to pay a rent. I think that is the fair meaning of it. If you do it, you may do it on a liability to pay rent. If that is the true construction of the document, he covenants to pay an increased rent. There is no absolute covenant that he will not do it. If that is the true construction of the document, then undoubtedly the declaration ought to have alleged that increased rent, and though the time for payment arrived, that it had not been paid. * * It seems to me that *Hurst* v. *Hurst* (4 Ex. 571, 19 L.J. (N.S.), Ex. 401) was well decided on principle, and that it is distinguishable from this case. In *Hurst* v. *Hurst* the Court says the meaning of the covenant is, "You shall not lop the trees; further, if you do you shall pay £20." If the covenantee think fit to avail himself of it, then the consequence is there may be a good breach of the original covenant: therefore the declaration is a good one. But the Court came to that

conclusion on the ground that there were two covenants there; one an absolute one—not to cut the trees, and the other an absolute one—to pay liquidated damages if he did so. But we decide this case on the ground that this is not so here. There is no covenant that the defendant will not remove the manure, but a covenant that he will not do it without paying £10; in fact, there is only one covenant, which is a complex covenant that he shall pay £10 if he remove it. It seems to me in this case, the plaintiff can only recover the agreed £10, that he is not entitled to claim unliquidated damages, and consequently he ought in the declaration to have shown he is entitled to £10 per ton, and made a good breach as to its non-payment; and in that case the declaration would be good; not having done so, it is bad, and is distinguishable from *Hurst* v. *Hurst* on the ground I have named."

Pollock C.B., referred to the report of *Hurst* v. *Hurst* in the Exchequer Reports, and said that Baron Parke had been misunderstood by the reporter. [See *Law of the Farm, p.* 77]. "He meant that the £20 was unliquidated damages, but that if they meant to go for that, they ought, according to *Lowe* v. *Peers* and the *Anonymous Case*, and another case, to have denied that it had been paid, because if a given sum is due as liquidated damages under the statute, you cannot sue unless you have not been paid. In *Hurst* v. *Hurst* there was no negation of the payment of the £20 penalty. What was passing in Baron Parke's mind was this: they had blended the two together, and the only way in which you can make sense of it is, that it is an entire action for unliquidated damages, though a part of it was undoubtedly liquidated. You cannot say they were liquidated, and sue for them, because you do not deny that they have been paid. You must, therefore, treat it as if it had been for unliquidated damages only; and this makes the whole matter clear" (*Leigh* v. *Lillie*).

"*Hay*" *in farming lease includes hay not fit for fodder.*—Where it was covenanted in a farming lease that an additional rent of £10 per ton should be payable "if hay, straw, or other dry fodder" should be sold and taken off from the farm, and hay had been taken off by the defendant which was not fit for food, it was held by the Court of Exchequer that such damaged hay was still within the meaning of the covenant, which implied that everything grown on the farm should remain and be used there (*Fielden v. Tattersall.*)

Construction of drainage covenant in lease.—An agricultural lease contained a covenant on the part of the lessor, his heirs, &c., that he and they would "drain with proper drain-tiles, one rood apart, ten acres of the land now in rye grass, at his and their costs, except the carriage of the said drain-pipes, which is to be borne and paid by the lessee; and will drain the remainder of the lands hereby demised, in *manner aforesaid*, upon being paid a further yearly rent of £5 for every £100 so expended." It was held by the Court of Common Bench, that the words "in manner aforesaid" referred only to the mode of performing the work, viz., placing the drain-tiles one rood apart; and consequently that the tenant was not chargeable with the expense of carriage of the drain-pipes beyond the first ten acres (*Beer appt.* v. *Santer respt.*)

Payment by landlord for manure and tillages, &c.—In *Newson* v. *Smithies*, the plaintiff covenanted with the defendant, his landlord, to deliver up possession of a certain farm and land on a day named, and that in the meantime he would cultivate the land according to the custom of the country, and that upon the delivering up of the land he would surrender and yield up a certain agreement to be cancelled, and all his unexpired term and interest in the farm, and would afterwards, on request, execute any farther deed for effectually surrendering the term; and the defendant covenanted that if the plaintiff did on the day named deliver up possession, and did and should in the meantime cultivate the land, according to the custom of the country, and *also did and should well and truly observe, perform and keep all and singular other the covenants and agreements thereinbefore contained, and on his part to be performed*, he, the defendant, would upon the delivery up of possession of the said land, on the day specified, so cultivated as aforesaid, *and on such performance of such other covenants aforesaid*, pay the plaintiff for the manure, tillages, hay, clover, and all other things then upon the land, as were usually paid for between an outgoing and incoming tenant. It was held by the Court of Common Pleas, on the authority of *Boone* v. *Eyre* (1 H. B., 273 *n*), that the delivery up of the agreement was not a condition precedent to the payment for manure, &c."

Right to have letters produced on question respecting valuation of tillage, &c.—In *Price* v. *Harrison*, the declaration stated an agreement between the plaintiff and defendant, that the plaintiff should lease to the defendant a farm, and that defendant should forthwith, after making the agreement, pay to the plaintiff the amount of certain tillages on the farm, at a valuation; and the breach averred was the non-payment of the valuation. The defendant on an affidavit stating that during the treaty for the farm, he had written letters to the plaintiff, which were in the plaintiff's possession, but of which the defendant had no copies, and that he believed *it was on such letters that the plaintiff relied to establish such agreement*, and that he had a just ground to defend the action, and that it was necessary for the purpose of his pleading that he should inspect the letters, obtained an order from a Judge at Chambers to inspect them. It was held, on cause being shown against a rule to rescind the order, that the defendant was *entitled to inspection at common law*. And per *Williams* J., "It did not follow in *Shadwell* v. *Shadwell* (28, L.J. (N.S.), C. P., 275), that a writing must be necessarily produced to prove the agreement referred to; but here the declaration could not be proved by parol evidence only. The plea there might have been supported by a release by parol, a writing was not necessary; and it also appeared to me that there was only a surmise that the defendant intended to rely on some document supposed to exist."

Infringement of Highway Act by the use of a steam thrashing-machine.—*Harrison* (app.) v. *Leaper* (resp.) was a case stated for the opinion of the Queen's Bench under 20 and 21 Vict., c. 13, and raised a question as to whether the appellant had been rightly convicted by the magistrates of an offence against the 70th section of the

Highway Act (5 and 6 Will. IV., c. 50). The section in question made it an offence to erect any steam-engine within 25 yards of a public highway, unless it were within some building, or so fenced as not to be dangerous to passengers. In the present case the appellant had sent his man with a steam thrashing-machine on hire to the premises of a farmer, who directed the servant to set the machine at work near a rick, within 12 yards of the highway. The steam-engine startled some horses on the highway, and they ran over their driver. It was objected, first, that the act did not apply to engines of this class, which, it was said, were not in existence when the act passed; secondly, that it was not erected; and thirdly, that the appellant had not the control of it at the time. The magistrates overruled the objections and convicted the appellant; and the Court quashed the appeal. And *per Cockburn* C.J., "It strikes me in this way: if a servant in the care of such an engine were to run up negligently against another with it, his master would be liable. If, however, he wilfully does so, his master would not be liable. So here, if he wilfully erected this machine in an improper place without his master's orders to do so, the master could not be made liable, under this Act of Parliament. Upon that ground I think the conviction cannot be supported. The master was not present, and there is nothing to show that the engine was placed in that particular spot by his direction."

Exemption from toll of barley to be ground for pigs.—Where a person sent by a horse and cart thrashed barley which had grown upon his farm to the mill for the purpose of having it ground into meal for feeding pigs upon the farm, and brought back meal, and which was to be used as food for the pigs, and the horse and cart had not been employed in any other way during the same day, the horse and cart were held to be *exempt from the payment of a toll* at a turnpike-gate through which they passed on each journey, inasmuch as the barley and also the meal came within the words "fodder for cattle" in section 32 of 3 Geo. IV. c. 126. And per *Cockburn* C.J., "These clauses giving exemption are to be construed in favour of agriculture, and we ought to put a liberal construction upon them. It is true that some difficulty at first sight occurs, as to whether barley in the course of being carried to the mill for the purpose of being ground into meal can be considered as "fodder;" but, upon the whole, looking at the words of the Act, and putting a liberal and fair construction upon them, from the moment that it is destined to be used as fodder it comes within the Act, although there may be an intermediate stage before it is converted into the state in which it is to be used as "fodder." If it were otherwise, this great inconvenience would ensue—that if a man having a crushing-mill on his own premises, and in taking the corn to be ground he passed through a toll-gate, he would not be exempt, whereas if he was taking it in its natural and primitive state he would be so. If barley to be used as fodder be exempt, it would be a great anomaly if the exemption did not exist where the barley was being carried to the place where the mill was, for the purpose of being crushed, and ground into meal to be used as fodder. So if a man was taking turnips for the purpose of being boiled to render them

more fit for the purpose of food for cattle, as is done in Scotland, the exemption would exist. A variety of such instances might be mentioned. The safer course is to decide in accordance with the intention of the Legislature and with the spirit in which the Act has been construed in former cases, and to say that where the corn was destined for the consumption of cattle, although there be an intermediate stage during which it may pass to the toll-gate, it is equally entitled to exemption from liability to pay toll as if it had actually been converted into food at the time" (*Clements* v. *Smith*).

Chapter XI.

TRESPASS AND GAME.

Plea of leave and licence in trespass.—In trespass, a plea of leave and licence means leave and licence in *fact*, and a licence in *law* must be specially pleaded, and *semble* it may be pleaded to part of a count if severable and distinct: per *Cockburn* C.J. (*Moxon* v. *Savage*).

Leave and licence.—To a declaration in trespass, and for breaking open a gate and lock, the defendant pleaded as an equitable defence, that disputes having arisen between the plaintiff and the defendant and other persons about a right of way, an agreement in writing was entered into between the plaintiff and the defendant and the said other persons, that without prejudice on either side to the question of right, a way over the *locus in quo* should remain open for the passage of the defendant and the said other persons, until the plaintiff's solicitor and the defendant should come to a definite understanding as to the course to be pursued in deciding the question in dispute; that all things happened necessary, &c., and that the alleged trespasses were committed in the use by the defendant of the said way, because the said gate had been wrongfully and contrary to the said agreement placed across it. It was held by the Court of Exchequer—1st, that the plea did not amount to a plea of leave and licence at common law, as the locking of the gate was a revocation of the licence to use the way; and 2ndly, that it was not good as an equitable plea, the circumstances disclosed not being such as would in equity entitle the defendant to have the plaintiff restrained by an unconditional injunction from prosecuting the action (*Hyde* v. *Graham*).

Reasonableness of a horse-racing custom.—To an action of trespass *quare clausum fregit*, the defendant pleaded that from time immemorial, on Ascension Day, horse races had been held, and of right ought to be held on land in a certain extra-parochial place, and that there was a custom for the freemen of the town of C to enter on the close for the purpose of horse-racing; and it was held on a demurrer to the plea and the authority of *Fitch* v. *Rawlings and Others* (2 H. Bl. C. B. 393) and *Abbott* v. *Weekly* (1 Levinz 176) that the custom was good and reasonable. The Court of Exchequer distinguished this case from *Millichamp* v. *Johnson* and *Bell* v. *Wardell* (Willis 202), because the right to go on the land in question was limited to a few days about the time of Ascension Day or Holy Thursday, whereas in these cases the custom to enter on land for the purpose of playing any rural sports

or games was held bad, as being too general and uncertain (*Mounsey* v. *Ismay*).

Mere permissive tenant has no right to sue a claimant under owner for forcible entry.—Where the plaintiff used land as a garden for more than 20 years, under permission from the owner to do so in order to keep it from trespassers, the owner from time to time coming on to the land, and giving directions as to the cutting of trees, &c., it was held by *Erle* C.J., that he had not got a title so as to enable him to sue a claimant under the owner for forcible entry. The learned judge observed, "It may be taken that the plaintiff had a beneficial occupation for more than 20 years, and if that will give him a title I will give him leave to move; but in my opinion every time Cox the owner put his foot on the land, it was so far in his possession that the statute would begin to run from the time he was last on it. Mr. Bovill moved in the Common Pleas, and took nothing (*Allen* v. *England*).

Forcible entry in exercise of right of common of pasture.—To an action of trespass for breaking and entering, and pulling down, and destroying the plaintiff's house, whilst he and his family were therein, and assaulting the plaintiff, and by so pulling it down endangering the lives and injuring the persons of the plaintiff and his family, and ejecting them therefrom, and taking the materials of the house; the defendant as to the breaking and entering and pulling down and destroying the house, and taking the materials, justified in the exercise of a right of common of pasture over the land, on which the plea alleged the house was wrongfully erected, so that without pulling it down the defendant could not enjoy the right of common of pasture. It was held by the majority of the Court of Exchequer that the case was governed by *Perry* v. *Fitzhowe* (8 Q.B., 757, 15 L.J. (N.S.), Q.B. 239), which is an authority that a house cannot be pulled down, a man being in it, and that the plea did not answer the action. The Court intimated that it was doubtful whether if the case had been before them for the first time they would have concurred in the judgment pronounced by the Court of Queen's Bench in *Perry* v. *Fitzhowe*, but that as the question was of no importance to the parties in the cause, except as to the question of costs, it was better to abide by that decision. And per *Wilde* B., "*Burling* v. *Read* (11 Q.B. 890, and 19 L.J. (N.S.), Q.B. 291), and *Perry* v. *Fitzhowe* establish a clear distinction between a man entering on his own land, and an entry to abate a mere infringment of a right of common" (*Jones* v. *Jones*).

Terms of certificate to deprive plaintiff of costs in action for wrong.—The certificate to deprive the plaintiff of costs under 23 and 24 Vic., c. 126, s. 34, where in an action for a wrong he recovers less than £5, must negative not only the trespass (in this case breaking and entering land of the plaintiff at Clapton in the parish of Hackney, and ejecting the plaintiff, and destroying a crop of French beans growing on the land) being wilful and malicious, but also that the action was brought to try a right, and that it was not fit to be brought. And per *Williams* J., "The case of *Saunders* v. *Kirwan* (30 L.J. (N.S.), C.P., 351), applies to the negative that the trespass was wilful and malicious, and the decision there is quite correct, inasmuch as if the certificate nega-

tives the trespass being either wilful or malicious, it necessarily negatives its being both wilful and malicious" (*Gooding* v. *Britnall*).

Construction of the Malicious Trespass Act.—The occupier of land found a man (employed by the owner) felling trees on to the land in such a way as to damage growing barley; and after again and again desiring him to desist gave him into custody for wilfully damaging the barley. In an action of trespass, the man recovered £20; and the judge having declined to certify for costs, a suggestion was entered to deprive him of costs, on the ground that the defendant was acting in pursuance of the Malicious Trespass Act (7 and 8 Geo. IV., c. 30, s. 22). *Blackburn* J. on the trial of the suggestion having left it to the jury to say whether the defendant really and reasonably believed he was acting according to law, and they found in the affirmative, it was held that whether the question was for the judge or the jury the verdict was right, and *semble* that it was rightly left to the jury (*Norwood* v. *Pitt*).

Estimating damages for trespass or negligent act.—In an action for a wrong, whether arising out of trespass or a negligent act, the jury in estimating the damages may take into consideration all the circumstances attending the committal of the wrong. In an action for wrongfully and injuriously pulling down a building adjoining the plaintiff's stable in a negligent and improper manner, and with such a want of proper care, that by reason thereof a piece of timber fell upon the plaintiff's stable and destroyed the roof, and by reason of the defendant's negligence, carelessness, and unskilfulness, part of the building fell upon and injured the plaintiff's horse, and evidence was given showing that the defendant had acted wilfully and with the object of forcing the plaintiff to give up possession of the stable, it was held by the Court of Exchequer that the jury were properly directed, that if they thought the defendant had acted with a high hand wilfully, and with the object of getting the plaintiff out of possession, the damages might be higher than if the injury was the result of pure negligence. And per *Bramwell* B., "Suppose a man was to put an offensive mixen on his own lands, opposite his neighbour's window, so as to be a nuisance, and for the mere purpose of annoyance, do you conceive that the damage could be limited to a mere pecuniary compensation in such a case as that it may be said the act is wilful as it is here?" And per *Channel* B., "My brother Bramwell has observed that in an action of trespass, that is in some action of tort, you may give evidence of damage beyond the actual injury sustained, in consequence of insulting circumstances connected with the trespass; and I can see no reason why that should be limited to one kind of action of tort, by trespass, and should not extend to an action which, in substance, is for negligence committed under circumstances which might have supported an action of trespass" (*Emblen* v. *Myers*).

Entry unlawful on day when plaintiff has whole of day to remove crops.—In trespass for entering land and breaking gates (the interest of the plaintiff under a contract for growing crops expiring on the day of which the entry was made by the defendant, who was entitled to the property), it was held by *Wightman* J. that as the plaintiff was entitled

to the *whole* of the day to remove his crops, the entry was unlawful, but the damages must be nominal, and an amendment to include the crops in the declaration was refused (*Archer* v. *Sadler*).

Liability for damage by fire occasioned by sparks from locomotive engine.—A railway company authorised by the Legislature to use locomotive engines, is not responsible for damage from fire occasioned by sparks emitted from an engine travelling on their railway, provided they have taken every precaution in their power and adopted every means, which science can suggest to prevent injury from fire, and are not guilty of negligence in the management of the engine, and so it was held in the Exchequer Chamber, reversing the judgment of the Exchequer [see *Law of the Farm p.* 275] (*Vaughan* v. *Taff Vale Railway Company*).

Trespass by entry to sow grass seeds at improper time.—Issue being taken on pleas justifying a trespass, in the exercise of an alleged right to sow grass seeds, with a general averment that all times had arrived, &c., it was held by *Erle* C.J., that evidence was admissible without a special replication to show that the entry was not at a proper time, and that the plaintiff having resisted the entry on to the land on that ground, an amendment of the replication if necessary would be allowable (*Lynn* v. *Comer*).

Injury by sparks from engine.—On the trial of an action against a railway company for an injury to the plaintiff's wheat rick, caused by the emission of sparks from one of the company's locomotive engines, owing to the negligence of the company, *Williams* J., after telling the jury that the evidence of the company was extremely powerful to show that the engine was of the best known construction, but that the evidence of the plaintiff's witnesses was that, in their opinion, the risk of causing mischief by sparks from the engine in question was not improbable, and that the engine was so constructed as to be dangerous without a precaution of some kind, left it to the jury to decide whether they believed either the plaintiff's or the defendant's witnesses on this point; and he also left it to the jury to consider whether each set of witnesses might not have been mistaken in the degree of excellence or of defect imputed to the engine; and if so, that it was still for the jury to decide, either for the company, if no further precautions could with reason be required, or for the plaintiff if they were in reason requisite. It was held by the Court of Common Pleas, that this direction was right, notwithstanding the case of *Vaughan* v. *Taff Vale Railway Company* (5 H. & N. 679, and 29 L.J. (N.S.), Ex. 247), there being a conflict of testimony on a question of degree, which was necessary for the jury. For the defendants, Mr. Bovill had relied *inter alia* upon the law laid down by the Exchequer Chamber in *Vaughan* v. *Taff Vale Railway Company*, that railway companies are not responsible for damage arising from the use of locomotive engines on a railway, unless they are guilty of negligence either in respect of the construction of the furniture or the conduct of such engine, and contended that a railway company would not be guilty of negligence in respect of the construction of their engine, if that construction was the best adapted both to prevent the damage complained of, and also to be efficient in

power, and that if the construction was that which was best adapted for these purposes in known practical use at the time the cause of action arose, the duty of the company was performed (*Fremantle* (*Bart.*) v. *London and North Western Railway Company*).

Horses frightened by traction engine on highway.—It was held by *Erle* C.J., that a plaintiff has a right to recover against the owner of a traction engine used on a highway under 24 and 25 Vict., c. 70, if he knew from his men or other persons, or from the nature of the engine itself, that the engine was calculated by its noise and appearance to frighten horses. The defendant has clearly no right to make a profit at the expense of the security of the public (*Watkins* v. *Reddin*).

Evidence of negligence necessary to entitle plaintiff to recover.—In an action for an injury occasioned by defendant's negligent driving, the plaintiff to warrant the judge in leaving the case to the jury, must give proof of well defined negligence on the part of the defendant; and where the evidence given is equally consistent with there having been no negligence on the part of the defendant, as with there having been negligence, it is not competent for the judge to leave it to the jury to find either alternative; such evidence must be taken as amounting to no proof of negligence. Foot-passengers, in crossing a highway, are bound to take due caution to avoid vehicles; and the drivers of vehicles are bound to take due caution to avoid foot-passengers. And per *Pollock* C.B. (3 C. and K., 81): "To sustain an action for an injury caused by the negligent driving of the defendant, the injury must have been caused by the negligence of the defendant only, without the negligence of the plaintiff contributing in any way to the accident" (*Cotton* v. *Wood*). The mere happening of an accident is not sufficient evidence of negligence to be left to the jury, but the plaintiff must give some affirmative evidence of negligence on the part of the defendant. Where, therefore, it was shown that the defendant was riding a horse at a walk, when the animal became restive, and rushing on to the pavement knocked down and killed the husband of the plaintiff, but the witnesses for the plaintiff also proved that the defendant was doing his best to prevent the accident, it was held that this was no proof of negligence; that taking the evidence of the witnesses for the plaintiff altogether, it was clear that the defendant was carried on to the pavement against his will, and that there was therefore nothing to turn the scale of evidence against the defendant, and to show that he was responsible for the consequences of the accident, but *quære* whether on an indictment for manslaughter the same presumption would be made in favour of a prisoner as for the defendant in an action for death caused by negligence (*Hammack* v. *White*).

Negligence in riding along a public highway.—The plaintiff was driving a waggon with three horses along a highway, walking in the usual way at the head of the leading horse, on his proper side of the road. The defendant and his groom were riding at a foot's-pace (meeting the waggon on the wrong side) when, just as he passed the plaintiff, the groom touched his horse with a spur and he kicked out, and struck the plaintiff. It was held by the Court of Common Bench

that the act of using the spur when so near to the plaintiff, was such an improper act on the part of the groom as to justify the jury in finding the defendant to have been guilty of negligence (*North* v. *Smith*).

Nuisance by brick-burning.—Where a man by an act on his own land, such as burning bricks, causes so much annoyance to another in the enjoyment of a neighbouring tenement as to amount *primâ facie* to a cause of action, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land. The fitness of the locality does not prevent the carrying on of an offensive though lawful trade from being an actionable nuisance, but whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance; an action will lie whatever the locality may be, and the decision of the Queen's Bench was overruled by *Erle* C.J., *Williams* J., *Bramwell* B., *Keating* J., and *Wilde* B.; Pollock C.B. *diss.* Thus *Hole* v. *Barlow* is overruled, the case upon which the Queen's Bench grounded their judgment (*Bamford* v. *Turnley*). Without expressly overruling *Hole* v. *Barlow*, Stuart V.S., had decided to the same effect in *Beardmore* v. *Treadwell*.

Onus on defendant to show that trade is carried on in a reasonable and proper manner.—The carrying on a lawful trade in the usual manner is not necessarily the carrying it on in a reasonable and proper manner, and where to an action for carrying on a trade in such a manner as to cause injury to the plaintiff, the defendant relies for a defence upon the fact of the trade being carried on in a reasonable and proper manner, the *onus* of proving that it is so carried on is on the defendant, and not on the plaintiff of showing that it is not so carried on, and the case does not come within the principle enunciated in *Hole* v. *Barlow* (4 C.B. (N.S.) 437, 27 L.J. (N.S.), C.P. 207), and per *Channel* B., "Whatever doubt I might have entertained at the trial has been cleared up in the course of the argument, and I am now satisfied that there was no evidence to go to the jury on one of the matters involved in the tenth question [Was the defendant's trade of calico printing, bleaching, and dying a lawful trade, carried on for purposes necessary or useful to the community, and carried on in a reasonable and proper manner and in a proper place?] which according to the decision of *Hole* v. *Barlow* was necessary to be established in order to raise a defence on that ground." The rule was discharged (*The Stockport Waterworks Company* v. *Potter and Others*).

In Wanstead Local Board of Health (*appt.*) v. *Hill* (*resp.*) it was decided by the Court of Common Pleas that brick-making is not an offensive or noxious trade or business within sec. 64 of the Public Health Act (11 and 12 Vict. c. 63), and per *Erle* C.J., "The question is, whether brick-making was intended to be absolutely prohibited within the district of a Board of Health, unless the leave of the Local Board be first obtained. I am opinion that it was not. The statute has prohibited certain businesses connected with animal matter, and brick-making is not a business analogous to those mentioned previous to the words 'or any other noxious or offensive business, trade, or manufac-

ture.' It may be carried on so as to be no annoyance, and is a proper use of land having clay, and therefore it is not within the statute. And per *Willes* J., if the contention of the appellants were right, the nicest questions of law and fact might have to be decided at petty sessions. In *Hole* v. *Barlow*, it was considered that the reasonableness of the place was to be regarded. It is still an open question for the Supreme Court of Judicature whether if a person carry on a necessary trade, under reasonable circumstances, he can be guilty of a nuisance. In *Bamford* v. *Turnley*, some of the Judges thought that his doing so is a nuisance, some that it is not. The reconciliation of these conflicting opinions is perhaps easier than it seems. Whether put as part of the definition of a nuisance, or as an exception to it, the question of reasonableness arises. The Legislature never can have intended to subject this question to the decision of petty sessions. The trades mentioned relate to animal matter. Whether that is material I do not say, but they certainly relate to substances which, without any operation of the persons manufacturing, must by putrefaction become a nuisance to the neighbourhood. Brick-making is not such a trade."

Pursuit of game under 25 *and* 26 *Vict. c.*, 114, *s.* 2.—Under the second section of the New Game Act, empowering constables to stop and search persons suspected of poaching, and, on finding game or instruments for taking game upon them, to summon them before justices, the justices may convict without direct proof that the persons charged have gone upon any land in pursuit of game, circumstantial evidence that they must have done so being sufficient.

This was a case stated by the justices of Essex, under the 20 and 21 Vict, c. 43, and related to the construction of the New Game Act, 25 and 26 Vict. c. 114, s. 2. The act provides that "It shall be lawful for any constable or peace officer, in any county, borough, or place, in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding and abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of a gun, or nets, or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game, or any such article or thing, is being carried by any such person, and should there be found any game, or any such article or thing as aforesaid, upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices of the peace assembled in petty sessions; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay," &c.

The appellants, Brown, Milbourne, Chapman, and Peters, were seen on the morning of Sunday, the 12th of October, 1862, at a few minutes past six, walking on the high road from Coggeshall to Braintree. They were close to the latter place, in which they resided, and in the direction of which they were proceeding. A police constable noticing that the pockets of some of them seemed to contain bulky articles, stopped them, and demanded permission to search them. Brown, after some demur, submitted to the search, and five dead rabbits, still warm, were found upon him. The other men walked on while Brown was being searched. At a quarter past seven search was made for Milbourne, who was found in his house in bed. His boots were wetter and dirtier than they would have been by merely walking along a high road. Chapman was also found at his own house.

A net was found in his pocket with rabbit fur in its meshes: fur was also found in his pockets, and on his coat-cuffs was fresh blood. Peters sold a dead rabbit for sixpence at a beershop in the course of the morning. A summons against the appellants having been applied for, the justices in petty sessions decided that the appellants came within the words of the Act, and inflicted a small fine upon them. Against this decision was the present appeal. The questions submitted to the Court were—1st, Whether or not it was incumbent upon the respondent to show affirmatively that the appellants had been unlawfully on any land in search or pursuit of game, and had so become unlawfully possessed of the rabbits. 2ndly, Whether or not there was, in point of law, evidence from which the justices might infer that the appellants had obtained such game by unlawfully going upon any land in search or pursuit of game, or had used any such gun or engine used for the killing and taking game, or had been accessory thereto. And per *Erle* C.J.: "As to all of the appellants, except Milbourne, the convictions must be confirmed. The three men are rightly convicted, although there is no eye-witness that they have been seen upon any land in search or pursuit of game. The justices have as much right to infer from circumstances that the parties have committed this offence as any other tribunal. Circumstantial evidence is a large and important branch of evidence, and frequently to be relied on, equally with or in a greater degree than other evidence. The circumstantial evidence here seems sufficiently strong. If the men had no land of their own, it would be puerile to suggest that they stumbled on these rabbits in the high road. The clauses in 1 & 2 Will. IV., c. 32, which relate to persons 'found' upon any land, empower apprehension, which this does not. This Act was intended to give further remedies. As to Milbourne, there is nothing to connect him with the death of a rabbit, and the circumstances are consistent equally with his innocence and guilt." *Williams, Willes, and Keating*, J.J., concurred. Conviction affirmed as to all the appellants, except Milbourne (*Brown and Others appts.* v. *Turner resp.*).

Rating game.—A tenant occupied land under a parol demise to him from year to year; the right to game, and of entering for the purpose of taking and killing it, being reserved to the landlord. The rateable

value of the occupation of the land without the right was £11 5s. 8d., and with the right £26 19s. 8d. The Quarter Sessions having found the above facts in a case of appeal against a poor-rate, in which the tenant was rated at the higher value, it was held that he was only liable to be rated at the lower value. And per *Crompton* J., in *Reg.* v. *Williams* (23 *Law Times* 76), it was held that the right of killing game raised the value of the farm in the tenant's hands, or that the price paid for that right might be taken into consideration in calculating the rateable value; and this supports the view, that whilst he had the farm without the shooting, he would have been rightly rated at so much less. The question really is, what does the tenant take? And if (whether under the statute, it be by reservation, or by contract between the parties) he takes the land only, without the privilege of shooting, the value of the occupation is so much the less. The demise is the land only, without the privilege, and it is in the respect of the land only, that he is rateable. This is not like the case where a man has a demise of the whole of a house, and only chooses to occupy a portion of the premises, for then he is liable to be rated for the whole; but if part of the premises be excepted out of the demise, and the demise be of part only, he is rateable for that part only (*Reg.* v. *Inhabitants of Thurlstone*).

Limitation of rights of a hirer of a shooting.—A person having an agreement for shooting over a farm, has only a right to exercise it in the usual and reasonable way, and not to tread over fields of standing corn at a time when it is not usual or reasonable, and whether the occupier standing by is evidence of actual leave and licence depends on all the circumstances. He has no right to turn rabbits on to the farm without express leave to do so, and he is liable to the occupier for damage done to the crops by rabbits or the *progeny* of rabbits, thus turned on by his express or implied authority, and *without* the occupier's licence: per *Erle* C.J. (*Hilton* v. *Green*).

Person with mere right of shooting cannot authorise arrest of poachers.—A person having only a right of shooting over land has no right to empower keepers to apprehend parties trespassing in search of game; and on their resenting with no greater violence than is used by the keepers, they will not be liable for an assault; but if the trespass is in the night, they may be indicted for night poaching; per *Martin* B., (*Reg.* v. *Wood*). But a gamekeeper appointed by a person having only a permission to shoot, trying to take a gun from a poacher, and in the scuffle causing a loaded gun to go off, which killed the poacher, was held by Lord *Campbell* C.J., guilty of manslaughter (*Regina* v. *Waley*).

Arresting poachers during the night.—The 14 and 15 Vict., c. 19, s. 11, giving any person the right to apprehend persons committing indictable offences in the night, was held by *Willes* J. to apply to persons night poaching within the meaning of 9 Geo. IV., c. 69, s. 9, although the night is defined to begin and end at different times in the two statutes (*Reg.* v. *Saunderson*).

For form of indictment under 9 Geo. IV., c. 69, s. 1, sufficiently alleging a third night poaching offence, which by the terms of the statute is made a misdemeanor, see *Reg.* v. *Cureton*.

Picking up pheasant shot in another's land a trespass.—A person who in his own land shoots a pheasant in the land of another, and goes on to such land to pick the bird up, commits a trespass of entering land in pursuit of game within the meaning of 1 and 2 Will. IV., c. 32, s. 30, the shooting and picking up of the bird being one transaction, but *quære* whether entering land for the purpose of picking up dead game is a trespass within that act. And per *Byles* J.: "If it were necessary for us to decide on this occasion, that dead game is within the statute, I should have desired time to consider. But I agree that the pursuit commenced with the shot, and terminated with the picking up. There was a pursuit and a trespass. It would be highly inconvenient to have to enquire in every case whether the bird had breathed its last or not when picked up" (*Osbond appt.* v. *Meadows resp.*).

Not essential to conviction for trespass in pursuit of game, that there should have been an intention to commit such trespass.—It is not necessary that a conviction under 1 and 2 Will. IV., c. 32, s. 30, for a trespass in pursuit of game, should be on the information of the owner or occupier of land, or of a party interested in the game, and on this point *Middleton* v. *Gale* (8 Ad. and E., 155) is decisive, and *semble* per *Williams* J. and *Willes* J., *dubitante Keating* J., that it is not necessary, in order to support a conviction under the above section, that the defendant should have intended to commit or have been conscious that he was committing a trespass. And *per Williams* J.: "The dictum of *Erle* J. in *Reg.* v. *Cridland* (7 E. and B., 853, 27 L.J. (N.S.), M.C., 28), is relied on by the defendant's counsel; but that case is wholly distinguishable, for it only decides that where the entry is made under a *bonâ fide* claim of right, no proceedings can be maintained against the person so entering upon the land. But that is upon a principle not peculiar to this case, but applicable to all cases, that no conviction can take place for an act done under a *bonâ fide* claim of right to do it. In the case of *Reg.* v. *Pratt* (24 L.J. (N.S.), M.C. 113), where the defendant was convicted of a trespass, although he never left the high road, the whole discussion was whether there was a trespass on another man's land; no one thought of suggesting that the defendant would not be liable if he had thought that he had a right to shoot on the high road. With regard to the hardship of thus deciding, I confess I cannot see it. If a person goes on to land to enjoy the diversion of shooting, he must take care that he has the leave of the person justified to give him leave; if he chooses to risk it, he must suffer the penalty if it is enforced against him" (*Morden applt.* v. *Porter respt.*).

Retaking rabbits from poachers.—If A wrongfully, after request to give it up, detain a chattel from B, the owner entitled to possession, B has the possession in law, and A's wrongful detention against B's request is no possession, but is the same violation of the right of property as the taking the chattel out of the actual possession of B, and B (or his servants acting under his command) is justified in using force sufficient to defend his right and retake the chattel. This was a declaration for assault and battery, and the plea was that the plaintiff

became the holder thereof, and had wrongfully in his possession dead rabbits belonging to E, and being about to carry them away, the defendants as servants of E, and by his command, requested the plaintiff to refrain, which he refused to do, and thereupon defendants as servants of E, and by his command, gently laid their hands on the plaintiff, and took the rabbits from him, using no more force than was necessary. This was held a good plea, although it did not allege how the plaintiff took the property of E. And per *Curiam*: "It has been decided that the owner of land entitled to the possession may enter thereon and use force sufficient to remove a wrong doer therefrom. In respect of land as well as chattels, the wrong doers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action lest the peace should be endangered if force was justified; see *Newton* v. *Harland* (1 Man. and G., 644). But in respect of land, the argument has been overruled in *Harvey* v. *Bridges* (14 M. and W. 437, 14 L.J. (N.S.), Ex. 384). Here *Parke* B. says: "Where a breach of the peace is committed by a freeholder, who, in order to get possession of his land assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public for a forcible entry, he is not liable to the other party, and I cannot see how it is possible to doubt that it is a perfectly good justification to say, that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed." In our opinion, all that is so said of the right of property in land applies in principle to the right of property in a chattel, and supports the present justification. If the owner was compelled by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the mischief instead of redressing it; and on these grounds, our judgment is for the defendants" (*Blades* v. *Higgs and Another*).

Rabbits the property of the person on whose lands they are started and killed.—If rabbits be started and killed on the land of another, they are the property of the person on whose land they are killed, but the Court were not prepared to decide whether there would be any distinction if the rabbits were driven off the land of one person on to another; and per *Willes* J.: "It is impossible to get over the case of *Lord Lonsdale* v. *Rigg* (1 H. and N. 923, and 26 L.J. (N.S.), Ex. 196). It will be well when this case is further considered, if it should ever be so, to compare the dictum of Lord *Holt* in *Sutton* v. *Moody*, with the passage in the Institutes of Justinian, where it is laid down that wild animals: 'Simul atque ab aliquo capta fuerint jure gentium statim illius esse incipiunt quod enim ante nullius est, id naturali ratione occupanti conceditur. Nec interest feras, bestias et volucres utrum in suo fundo quisque capiat an in alieno.' The same rule has been adopted in all countries professedly governed by the Roman civil law." Here the defendants, servants of the Marquis of Exeter, claimed the bags with rabbits in them out of the luggage-van, and

emptying out the rabbits returned the bags (*Blades* v. *Higgs and Another*). This decision was affirmed in the Exchequer Chamber, on the ground that *Lord Lonsdale* v. *Rigg* had settled the question. And per *Wilde* B.: "I think the right of property in animals *feræ naturæ* has been carried too far. It has been argued in this case, that such animals are not the subject of individual property, but this is not so, the Common Law gives that right. But the right of property is not absolute, for if such animals obtain their freedom again or go off the land, the property is said to be lost. In cases of confinement or of fixed abode, the law does not refuse to recognise a right of property, co-extensive with that state of things. The almost general system of enclosure has wrought a great change in the character of game in this country, and a vast quantity of game never stirs from the enclosed property. It is too late now for the Common Law Courts to declare live game to be property, but if the Legislature should give that right of property, it would only be acting in accordance with the spirit and policy of the Common Law."

Tenant killing rabbits where "game" reserved to landlord.—Spicer & Others (appts.) v. *Barnard* (resp.) decided that where a tenant occupies land under a lease, which reserved to the landlord the exclusive liberty to shoot, hunt, fish, and sport over the land, the tenant may lawfully employ his servants to kill rabbits on the land. This was a case stated by Justices in Petty Session. When the appellants were called on to plead, their solicitor handed in a written notice, by which they denied that they had committed any trespass, but admitted that they were at the place by direction of Jesse Spicer (who proved the fact), the occupier of the land, in search of rabbits, under a *bonâ fide* claim of right, but, if such right were disputed, they submitted that the magistrates had no jurisdiction to decide on the hearing of an information for a penalty, but must leave the landlord to his action at law. The justices convicted the appellants, on the ground that they appeared to have been guilty of the offence, and that the defence set up by them amounted not to a *bonâ fide* claim of right or title, so as to oust the jurisdiction of the justices, but merely to a plea of leave and licence of the occupier of the land, and that such plea was no defence under sec. 30 of 1 & 2 *Will.* IV., c. 32.

And per *Hill* J.: "The question is whether the appellants were so employed as to be liable to penalties under the 30th section of stat. 1 & 2 *Will.* IV., c. 32, and I am of opinion that they were not. *Game is defined by the 2nd section; the parties interested in the land are left to their own contracts about rabbits. The 12th section applies to the tenant, and concerns game only.* The 30th section goes a great deal farther, and embraces much more than the game defined in the 2nd section, because it is directed against persons committing trespass by entering land in pursuit of game or woodcocks, snipes, quails, landrails, or coneys, but it leaves altogether untouched the power of the tenant to kill either woodcocks, snipes, quails, landrails, or coneys, and, if he can do so himself, he may *bonâ fide* employ his servants to do so. If the landlord wishes the tenant not to kill rabbits, he must so arrange in his contract with the tenant, and then he has his remedy

at law on the contract." The conviction was quashed without costs, because the magistrates made a mistake in law.

Labourer taking rabbit by order of farmer whose lease made no mention of rabbits in its game reservation. — A labourer employed upon a farm, the right of sporting over which was reserved to the landlord, was authorized by the tenant to go and kill a rabbit for his wife, who had been confined; and the justices having found that he killed the rabbit as the servant of the tenant. and by his order, it was held, on the authority of *Spicer* v. *Barnard* (28 L. J. (N.S.) M. C. 176), that the labourer was not liable to be proceeded against under 1 & 2 *Will.* IV. c. 32 s. 30 for a trespass in pursuit of coneys. Hawkins, his master, had succeeded one Christmas as tenant on the terms generally of Christmas's lease, of which there had been no assignment, and had constantly killed rabbits on the land in his occupation. The original lease between Christmas and Padwick contained no mention of rabbits in its reservation of game, and in the agreement between Hawkins and Padwick there was this exception in reference to game —"excepting that the said H. J. Hawkins shall have permission to sport over the said farm and lands" (*Padwick* appt. v. *King* resp.).

Boná fide assertion of right under Game Act.—The jurisdiction of the justices to convict summarily under 1 &2 *Will.* IV. c. 32 s. 30 for trespass in pursuit of game is ousted when a question of right to be on the land is *boná fide* raised between the complainant and defendant, according to *Reg.* v *Cridland* (7 E. & B. 853, 27 L. J. (N.S.) M. C. 28) and *Morden* v. *Porter* (7 C. B. (N.S.) 641, and 29 L. J. (N.S.) M. C. 226). —*Legg* appt. v. *Pardoe* resp.

Mere vague belief of right not sufficient to oust jurisdiction of magistrates under Game Act.—A person charged under stat. 1 & 2 *Will.* IV. c. 32 s. 30 with trespassing in pursuit of game in the daytime on land in the occupation of a tenant to A, set up a claim of right to shoot over the land on the ground that he and every one who chose had always shot there till some recent acts of interruption, and declared his readiness to try the right with A. It was held by the Court of Queen's Bench that the mere assertion of such a general right in himself and every one else, though he really believed it, without showing any such claim of right as would be a defence to an action of trespass, did not oust the jurisdiction of the magistrates to convict under the statute in question. The appellant relied mainly on the case of *Reg.* v. *Cridland.* And per *Wightman*: "In that case the defendant, upon the hearing of an information against him under the same statute, claimed a right to enter and kill game in the land then in question under an authority given by a person who claimed to be the owner of the land, and proposed to set up that title, and the authority under it, as an answer to the information. The justices, however, convicted him; but the Court of Queen's Bench were of opinion that a *boná fide* claim of title to the land ousted the jurisdiction of the magistrates. In the present case, however, the appellant did not set up any title to the land in himself, or in any person under whose licence or authority he proposed to act, and the case is therefore distinguished from that of *Reg.* v. *Cridland.* The appellant only set up a general right in himself, and any one who pleased, to

shoot over the land in question without showing or professing to show such a claim of right as would be a defence to an action of trespass. He may have believed that he had a right, because he and many others had for many years shot over the place in question; but I am disposed to think that the mere belief that he had a right is not sufficient, under the terms of the statute now in question, to oust the jurisdiction of the magistrate, as it might under the Malicious Trespass Act. At all events, that was a point for the magistrates in the first instance to determine; and unless they should clearly appear to be wrong, I do not think that this Court ought to interfere with the exercise of their discretion. The claim of right is so vague, that the magistrates might well think that there was no legal ground upon which it could be entertained, so as to warrant their considering it to be *bonâ fide* in such a sense as to oust their jurisdiction. I may observe that in the case of *Morden* v. *Porter* (7 C. B. (N.S.) 641, 29 L. J. (N.S.) M. C. 226), which was a proceeding under the Game Act 1 & 2 *Will.* IV. c. 32 s. 30, two of the three learned justices of the Court of Common Pleas who decided the case were of opinion that the *mens rea* or its absence did not affect the question of liability. The conviction was proper, and must be affirmed (*Leath* v. *Vine*).

Ousting justices' jurisdiction.—In a prosecution for a trespass in pursuit of game under 1 & 2 *Will.* IV. c. 32 s. 30, the defendant cannot oust the jurisdiction of the justices by disputing the title of the person who is alleged in the information to be in occupation of the land in question. In order to do that, he must make a *bonâ fide* claim of title on behalf of himself or of those under whom he claims. The justices are to consider whether the occupation is proved as alleged in the information. It was held by *Cockburn* C.J., *Blackburn* J., and *Mellor* J., that if there was any evidence before the justices proving the occupation as laid, they would be justified in deciding that the information was proved; and that a superior court ought not, upon a case granted by them under 20 and 21 *Vic.* c. 43, to interfere with their decision. It was shown on the evidence on behalf of the lord and in support of the prosecution that the appellant was beating for game with a dog and gun on the day in question in a part of the parish of Slow *cum* Quy called Quy Fen, and that he asked a witness not to say anything about it, and that Quy Fen was within the manor of Slow *cum* Quy, the bounds of which were coterminous with the parish. The appellant gave evidence to prove that he had been in the habit of shooting over Quy Fen for forty years, and that the inhabitant householders had paid a tax raised for the draining of Quy Fen.

And per *Cockburn* C.J.: "I have a very strong opinion tha the doctrine as to the jurisdiction of justices being ousted by a claim of right applies only to a claim of right alleged by the defendant as a part of his case, which he comes before the justices to set up. If he *bonâ fide* raises a question of title in himself, the justices have no longer any jurisdiction to go on with the hearing; but there must be some show of reason in the claim, and it is not sufficient unless he satisfy the justices that there is some reasonable ground for his assertion of title. Here I do not think that there was any

reasonable ground, and therefore the justices had a right to go on with the hearing." And per *Wightman* J.: "I repeat what I said in *Leath* v. *Vine* (30 L. J. (N.S.) M. C. 207), that the defendant 'may have believed that he had a right because he and many others had shot over the place in question'; but I am disposed to think that the mere belief that he had a right is not sufficient under the terms of the statute now in question to oust the jurisdiction of the magistrate, as it might under the Malicious Trespass Act. It appears to me that there was not such a *bonâ fide* claim of right as was contemplated by the law. He sets up no such title in himself as is known to the law."

And per *Blackburn* J.: "It was decided as long ago as in *Calcraft* v. *Gibbs* (5 Term Rep. 19) that in an action for penalties on the game laws it was no defence that the defendant had acted as a gamekeeper under a deputation from a person claiming a right to appoint the gamekeeper, there being no ground for the claim, and that the honest belief of the gamekeeper was no justification. The same was held by my brother *Wightman* in *Leath* v. *Vine*. The case of *Reg.* v. *Cridland* (7 E & B 853, and 27 L. J. (N.S.) M. C. 28) shows that the claim of right must be *bonâ fide* set up by the defendant as in himself, or in those under whom he claims, and if that is done the justices ought to hold their hands. But here the defendant sets up the *jus tertii*, and therefore the rule of law as laid down in *Reg.* v. *Cridland* does not apply, the claim of title is not set up, and the justices are not called upon to hold their hands" (*Cornwell* appt. v. *Sanders* resp.).

Young pheasants still under protection of hen in coop by day are not game.—It was held by *Pollock* C.B. and *Williams* J. that a prisoner cannot be convicted under 9 *Geo.* IV. c. 69 s. 9 for entering land by night, armed for the purpose of taking game, when his object is to steal young pheasants which had been hatched by a hen, and had not yet become wild. Although they roosted on trees near the coops, they were still under the care and protection of the hen, and therefore were Dr. Vernon's property, and not game, which is not the subject of property, and the prisoner was convicted of a common assault (*Reg.* v. *Garnham*).

Tame deer in park personal property.—Tame deer in a park are personal property, and the Court will not interfere to restrain waste in not keeping up the herd; and per *Wood* V.C.: "I confess I do not see how I can get over the case of *Morgan* v. *The Earl of Abergavenny* (8 C. B. 768), which was decided by judges of great authority, who had all the facts before them. The facts of this case seem to me to be identical with the facts in that, if not stronger. In that case, the park was 900 acres in extent, and in this case it is only 114 acres. In both cases the does were watched in the falling season, and the fawns marked, to ascertain their age and preserve the stock. They were driven into pens by keepers, and shot, and the carcases dressed and prepared on the premises. The injunction would be granted if the animals were proved to be in a wild state, and it was proved that they were being gradually reclaimed by a person whose duty it was to preserve them wild" (*Ford* v. *Tynte*).

Delivering live wild pheasants out of season.—The 4th section of 1 & 2 *Will.* IV. c. 32 (which imposes penalties on any licensed dealer who

shall buy, sell, or knowingly have in his possession or control any "bird of game" after the expiration of ten days from the day on which the killing of such bird becomes unlawful; and on any unlicensed person who shall buy or sell any "bird of game" after the expiration of the ten days, or shall knowingly have in his possession or control any "bird of game," except birds of game kept in a mew or breeding place, after the expiration of forty days from the same period) extends throughout to live birds, and a licensed dealer is liable to penalties for selling live pheasants after Feb. 11. And per *Wightman* J.: "The whole question turns on the meaning of 'birds of game' in sec. 4 of 1 & 2 *Will.* IV. c. 32. The words must have clearly the same meaning throughout the section; and the exception in the latter clause 'except birds of game in a mew or breeding place,' beyond all question applies to *live* game. It is clear that the phrase 'birds of game' was intended certainly to include live birds of game, and dead also in all probability. But it is sufficient to say for the present purposes that live game are within the section. As to the case of *Porritt* v. *Baker*, I do not see that the decision touches the present point." [*Parke* B. seemed to think, in *Porritt* v. *Baker* (10 Ex. 759), that pheasants might be supplied by a dealer out of a mew] and per *Hill* J., according to *Parke* B.'s judgment, a licensed dealer might supply live game, provided he caused them to be delivered out of a mew or breeding place, *and on a contract made during the season.* Here the bargain was made on March the 29th, and expressly for *wild* pheasants which came from Norfolk" (*Loome* appt. v. *Bailey* resp.).

Lord of Manor's right in a fishery.—A canal act provided that the lord of every manor through which the canal and reservoirs thereto belonging should be made should be entitled to the right of fishery in so much of the canal and reservoirs as should be made in, over, or through the common waste lands within his manor, and that the owners of any other lands through which the canal should be made should also have the like right of fishery of and in so much of the canal as should be made in, over, or through their lands wherein they had the right of fishery before the passing of the act. It was held by the Court of Exchequer that the right reserved to the lord of the manor was confined to common or waste lands where the lord was owner of the soil, and therefore did not extend to open Lammas lands, the soil of which was in various owners, the occupiers intercommoning for a certain part of the year (*Grand Union Canal Company* v. *Ashby*).

Lord of Manor's exclusive right to sport over allotments.—Ewart v. *Graham* (Bart.) was confirmed with costs in the House of Lords (29 L. J. (N.S.) Ex. 88). It was a proceeding by way of writ of error, brought for the purpose of reversing a decision of the Court of Exchequer Chamber, partly affirming and partly reversing a judgment of the Court of Exchequer, pronounced on a special case stated for the opinion of that Court. Lord Wensleydale adhered to his Exchequer decision, that there was a reservation of the *de facto* right: he only doubted whether this case could be distinguished from *Greethead* v. *Morley* (3 M. & G. 139, and 10 L. J. (N.S.) C. P. 246); but if it could not, he was prepared to say that case was wrongly decided.

Hence the lord still possesses the exclusive right of hunting, shooting, &c., over the allotments.

Lord of Manor not entitled to shoot over allotments of common.—In *Bruce* v. *Helliwell*, an Inclosure Act, after directing one-sixteenth of the common land to be allotted to the Lord of the Manor as a compensation for his right to the soil, and the residue (with certain exceptions) among the commoners, contained a proviso that nothing in the act should defeat, lessen, or prejudice the right, title, or interest of the lord to the mines and minerals in or under the said commons, or to any seignories or royalties incident and belonging to the manor, the same being thereby reserved to the lord, with full power for him at all times to hold and enjoy all rents, fines, duties, customs, and services, and all courts and perquisites, and liberty of hunting, coursing, fishing, and fowling within and throughout the said manor; and all goods and chattels of felons, treasure trove, waifs, estrays, forfeitures, royalties, jurisdictions, purchases, and privileges whatsoever to the said manor incident or appertaining (other than and except such right as could or might be claimed by him as owner of the soil and inheritance of the said commons) in as full ample and beneficial manner to all intents and purposes as if the said act had not been passed. As owner of the soil of the commons, the lord had before the act the free and exclusive right and liberty of sporting and killing game thereon, but there was no right of free share or free warren within the manor. It was held that the lord retained no right to shoot over the allotments. And per *Bramwell* B.: "*Ewart* v. *Graham* is distinguishable from this case, inasmuch as the words in it were that the lord was to have the right of shooting, fowling, coursing, and so forth over the allotted lands. It might be that that right had been conferred upon him under some mistake as to its previous existence; but whether it was conferred upon him owing to that mistake or not, the answer is that it was conferred upon him. It might have been conferred upon him under a mistake, namely, under the misapprehension which my brother Martin referred to as to the rights of lords of manors. Whatever be the origin of it, there it was."

CHAPTER XII.

TITHES.

The new Tithes Act.—The several Acts of Parliament for the commutation of tithes in England and Wales were lately extended by the statute 23 and 24 *Vic.*, c. 93. According to the new law, corn rents under local acts may be converted into rent-charges, which rent-charges are to be apportioned by the commissioner, with power to appeal to a court of law. Tithes commuted for a sum or rate per head of cattle may be converted into a rent-charge. "Whenever a sum or rate per head shall be in arrear, the arrears shall be recoverable by distress, and impounding of any cattle, stock, goods, or chattels belonging to the person in respect of whose cattle or stock such sum or rate per head is in arrear, wherever the same may be found." The commissioners have access to the books of the comptroller of corn returns, and are to be furnished by him with such information as they may require for the purpose of any award of rent-charge in lieu of corn rents.

Rent-charge on hops.—Under the Tithe Commutation Act, after a commutation of the tithes of a parish, an allotment being made under an inclosure act "of common and waste land," and part of the land so enclosed being turned into a hop ground, it was held by *Cockburn* C.J., *Blackburn* J., and *Mellor* J., that as the tithe on the land in question had been extinguished, it had been commuted, and that it was not material that it had never been tithed, for it was titheable, and the commutation was in respect of liability to tithe, not of actual payment of tithes, and therefore they gave judgment for the defendant. But *per Wightman* J., there was no commutation of tithes in respect of this land, there being, in fact, nothing to commute, tithes having never been paid in respect thereof (*Trimmer* v. *Walsh*).

Liability of rent-charge to poor-rates.—The incumbent of a district parish, created under the New Parishes Acts, 1843 & 1856, is not liable to poor-rates, in respect of a yearly rent-charge, payable out of the tithe rent-charge of one of the parishes out of which the district parish is created (*Reg. on prosecution of Tolleshunt, Knights* resps. v. *Rev. W. H. Friend* appt.).

A commutation tithe rent-charge is liable to a general rate and lighting-rate levied under Metropolitan Act (18 & 19 *Vict.* c. 120 s. 161). *Semble* that a commutation tithe rent-charge is not liable by law to contribute to a sewer's rate (*Reg.* v. *Goodchild and Lamb*).

Grantee of rent-charge liable for income-tax.—The grantee of a rent-

charge is the person bound to pay the income-tax due upon such rent-charge. (*Festing* v. *Taylor*).

Jurisdiction of commissioner.—By a private Act of Parliament passed in 1762, for carrying into effect an agreement between the landowner and rector for the commutation of tithes on certain lands in the parish of W, it was declared that certain rents therein specified should be vested in the rector, in lieu of and as full compensation for all tithes of corn, grain, hay, wool, lambs, and all other tithes whatsoever, except as after-mentioned, arising from all or any of the lands in the said parish, save and except marriage, churching, and burial-fees, "providing that nothing in the act should prejudice the right of the said rector or his successors to any marriage, churching, or burial fees, nor the right of tithe and customary stocking" in certain specified lands, "the modus in the groves and ancient closes adjoining to the town, and all other petty and personal tithes not herein mentioned and relinquished, all which the said rector reserves, and they are hereby reserved to him and his successors in full right and in as ample manner as they have always been enjoyed." The assistant tithe commissioners having decided that the said lands called "ancient closes" were not exempt from tithes; it was held on motion for a prohibition, that the tithes of the "ancient closes" were not commuted or extinguished by the private act of 1762, and therefore the jurisdiction of the commissioners was not taken away by sec. 90 of the Tithe Commutation Act, 6 & 7 *Will.* IV. c. 71. *Semble* that even if the tithes of wool and lamb were not included in the modus reserved to the rector, and were therefore extinguished by the act of 1762, such practical extinguishment of tithes arising out of the lands would not satisfy section 90, so as to deprive the commissioners of jurisdiction (*Re Wintringham Tithes ex parte Lord Carrington*).

"*Outgoings*" *include land-tax and commutation rent-charge.*—On the construction of an agreement between landlord and tenant for the lease of a farm for a term of years at a yearly rent of £40, payable quarterly, "free of all outgoings." It was held by *Stuart* V.C. that the word "outgoings" did not include the land-tax and tithe commutation rent-charge. The decision was reversed by Lord Chancellor Campbell, who observed: "Mr. Hobhouse, for the plaintiff, mainly relied upon *Cranston* v. *Clarke* (Sayer 78), but this authority was outweighed by the other authorities which had been cited, particularly *Bradbury* v. *Wright* (2 Doug. 624), and *Bennett* v. *Womeck* (7 B. & C. 629, and 6 L. J. (N.S.) Q. B. 175). The certificate must, therefore, be varied by making the rent payable free of land-tax and tithe commutation rent-charge (*Parish* v. *Sleeman*).

Occupier of tithe rent-charge compelled or voluntarily appointing curate may deduct salary from rateable value of rent-charge.—Where two parishes, each separately supporting its own poor, and having each its own church, have been immemorially united as one ecclesiastical benefice, and in order to the due performance of the clerical duties of his two parishes the incumbent necessarily requires the assistance of a curate—in assessing his tithe commutation rent-charge in one of the parishes to the poor-rate the incumbent is entitled to a deduction in re-

spect of the salary which he pays to the curate. The Court thought that the case was not distinguishable from *Reg.* v. *Goodchild* (1 El. B. & E. 1, & 27 L. J. (N.S.) M. C. 233), which decides that if a rector being entitled to a tithe rent-charge is assessed to the poor-rate as occupier of the rent-charge, and if he can be compelled to appoint a curate, or if acting under a proper sense of religious duty he voluntarily appoints a curate, the salary of the curate ought to be deducted in estimating the rateable value of the rent-charge; the distinction put being such a case and such a case, in which "the incumbent is non-resident, or, being resident, from sickness, infirmity, or any less creditable cause," employs a curate to perform his duty. That decision, therefore, decides the present case in favour of the appellant. It is conceded that the bishop could interfere and compel the appointment of a curate; and even were it not so, it cannot be disputed that, owing to the area of the two parishes, it is impossible that the proper number of services could be performed by the incumbent without assistance; and therefore the case comes within one or other of the alternatives in which, according to *Reg.* v. *Goodchild*, the curate's salary ought to be deducted (*Williams* appt. v. *Overseers of Llangeinwen* resps.)

Perpetual payment to incumbent of new district not to be deducted in assessing tithe rent-charge to poor-rate.—The rector of a parish, who, pursuant to the statutes in that behalf, has charged the tithe rent-charge with the perpetual payment of an annual sum towards the stipend of the incumbent for the time being of a new ecclesiastical district, formed, under the statutes, of part of the parish, is not entitled to have the sum so charged deducted in assessing the tithe rent-charge to the poor-rate.

And *per Curiam*: "It is true that it has been held in the case of *Reg.* v. *Goodchild* (27 L. J. (N.S.) M. C. 233) that an incumbent entitled to rent-charge, who employs a curate either because he is compellable by the bishop to do so, or because the magnitude of the case properly requires it, is entitled to have the stipend of such curate deducted from the assessable value of the tithe rent-charge. But we are of opinion (as indeed we intimated in the recent case of *Wheeler* appt. v. *Overseers of Burmington* (31 L. J. (N.S.) M. C. 57) that the principle of the decision in *Reg.* v. *Goodchild* ought to be carried no further. We think it ought not to be applied to a case where the owner of the tithe rent-charge voluntarily parts with a portion by creating a rent-charge on it to endow another minister. *Primâ facie* tithe rent-charge, like any other real property in a parish, 'is to contribute to the poor-rate. But if the contention of the present appellant were to prevail, so much of the tithe-charge as has been charged for the endowment of the new district parish would be withdrawn from contribution to the rate, for the amount assigned to the minister of the parish is not assessable in his hands; no portion of the tithe rent-charge itself has been conveyed to him; a charge only on the tithe rent-charge has been created by the grant. If, therefore, the amount of the charge in favour of the new minister is not assessable in the hands of the appellant, it ceases to be assessable at all; a state of things, of the injustice and inconvenience of which the parish would certainly have a

right to complain" (*Lawrence* appt. v. *Overseers of Tolleshunt Knights* resps.).

Lessee of tithe rent-charge not entitled to deduct stipend to curate. — The lay impropriators of the tithes of the parish of B granted a lease of their tithe rent-charge, at a nominal rent, to the appellant for twenty-one years, if he should so long remain the vicar of the adjoining parish of W, he covenanting to serve the cure of B either by himself or a curate. In order to the proper discharge of the duties of the two parishes, it was necessary to employ a curate for B, and it was held that in assessing the appellant to the poor-rate of B, as occupier of the tithe rent-charge, he was not entitled to any deduction in respect of the stipend which he paid the curate. And per *Blackburn* J.: "If the facts were that the parishes of Wolford and Burmington were one benefice, and that Mr. Wheeler was compelled to employ a curate to assist him in the proper discharge of the duties of the two churches, then he could claim exemption within the principle laid down in *Reg.* v. *Goodchild* (1 E. B. & E. 1, and 27 L. J. (N.S.) M. C. 233). But on the facts as they appear in the case, the tithes or tithe rent-charge of Burmington are held by Mr. Wheeler, not as having been instituted to the vicarage of Wolford, but because he has become lessee of them from Merton College. He has become lessee, and he pays rent in services instead of money. If he paid in money, he could not deduct the amount. It is enough to say that this is the case of a lessee of a tithe rent-charge, and not at all a case to which *Reg.* v. *Goodchild* applies (*Wheeler* appt. v. *Overseers of Burmington* resps.).

Assessment of occupier of tithe rent-charge.—The Archbishop of Canterbury, being owner of the impropriate rectory and tithe rent-charge of the parish of H, and of a piece of land thereunto appertaining, granted (under the Augmentation Acts 29 *Car.* II. c. 8, and 1 & 2 *Will.* IV. c. 45) to the perpetual curate for the time being of an annual rent of £40, to be charged upon and yearly issuing out of the said rectory, tithe rent-charge and land; and he afterwards leased the same to G. for 21 years, G yielding and paying yearly to the archbishop £9 13s., and also £6 16s. for redeemed land-tax, and to the perpetual curate for the time being of T. the said sum of £40. It was held that, in assessing G to the poor-rate of H., as occupier of the tithe rent-charge, G was not entitled to any deduction in respect of the yearly payment of £40, such payment being so much rent paid for his occupation of the tithe rent-charge, and not a charge upon him as occupying tenant, nor so much tithe rent-charge withdrawn from his occupation. And per *Blackburn* J.: "The person rated ought to be rated according to the value of the rateable property which he occupies, and the rateable value is the rent at which the same might be reasonably expected to be let for from year to year. What does the appellant occupy? He occupies the whole of the property comprised in the lease, viz., the tithe rent-charge and the half-acre of land. That the curate of Thannington is not the occupier in respect of the £40 is shown by *Frend* v. *Tolleshunt Knights* (28 L. J. (N.S.) M. C. 169). That seems to me a sound decision, and it shows that the party charging, or his assignee or

tenant, must occupy the whole hereditament, though charged. For the appellant, it is said the charge is a charge on the occupying tenant. I think not. *Reg.* v. *Goodchild* (E. B. & E. 1, 27 L. J. (N.S.) M. C. 233) was cited as an authority for the appellant; but the decision bearing on the present case was founded on a different principle, viz., on the peculiar nature of the enjoyment of tithes or other ecclesiastical benefice by a beneficed clergyman. The present appellant, though a clergyman, does not occupy this tithe rent as a clergyman" (*Reg. on prosecution of Overseers of Hernhill* v. *W. J. Groves*, Clerk).

Chapter XIII.

LANDLORD AND TENANT.

Contract for quiet enjoyment.—It was held by the Court of Queen's Bench in *Hall* v. *City of London Brewery Company* (limited), confirming *Bandy* v. *Cartwright* (8 Ex. 913, 22 L.J. (N.S.), Ex. 285), that there is a contract for quiet enjoyment implied in a demise of tenement, but not for good title. A similar promise is not implied in an agreement to give a lease containing such covenant, and further act must be done before the promise arises (*Brashier* v. *Jackson*).

Implied agreement for quiet enjoyment.—On a parol tenancy from year to year, it was held by the Queen's Bench that there is no implied agreement for quiet enjoyment beyond the duration of the lessor's interest, and if he is himself a termor, and the tenant was aware of this, the latter, in case of eviction on the expiration of his landlord's term, can maintain no action against him for such eviction (*Penfold* v. *Abbott*).

Meaning of "premises."—Where a testator by his will empowered his trustees to permit the person entitled for life or any greater estate in the S property to occupy the mansion, gardens, and "premises" rent free, and the home-farm had no farm-house, and the farm-buildings and farms were occupied by the testator at the time of his death, it was held by the Lord's Justices that the "premises" meant premises in immediate connection with the house, and did not include the home-farm (*Lethbridge* v. *Lethbridge*).

Tenancy at will.—When a tenant at will is warned to quit, and afterwards has leave given him to remain on part of the property, this permission commences a new tenancy from the date of which the Statute of Limitation runs (*Loch* v. *Matthews*).

Demise of three years certain.—A demise by deed for the term of three years, "determinable on a six months' previous notice to quit by either lessor or lessee, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," is a demise for three years certain, and the tenancy cannot be determined sooner than by a six months' notice, ending with the third year. And per *Bramwell* B.: "I should say that the defendant [the tenant, who gave notice] would be right, but for the word '*otherwise*;' 'otherwise to continue from year to year until the term shall cease by notice to quit at the usual times' must refer to the tenancy after the expiration of

the three years. It is merely an inartificial mode of expression (*Jones* v. *Nixon*).

Action upon agreement for lease.—An agreement not under seal between two persons, by which one agrees to let, and the other to take, certain premises for the term of seven years, and by which it is agreed that a good and sufficient lease of the premises shall be prepared, may be good as an agreement; so that an action may lie upon it for not accepting the lease when prepared, although it would be void as a lease in consequence of 8 and 9 Vict., c. 106, s. 3. And per *Blackburn* J., the Act of Parliament does not say that the agreement, by which the parties agreed that a lease should be granted, should be void. I do not know that there is anything illegal in such an agreement, so that it should be void. The words of the statute merely mean that it shall create no estate and pass no interest" (*Bond* v. *Rosling*).

Document void as a lease requires agreement stamp.—Where a document void as a lease is tendered in evidence to show the terms of a collateral agreement, it requires a stamp as an agreement: per *Byles* J. (*Golden* v. *Taylor*).

An entry at Old Michaelmas cannot be implied.—In *Hogg* v. *Norris and Berrington* it became necessary to prove a notice to quit, and one was put in served on both defendants on 5th of April to quit at Michaelmas. To make this a sufficient six months' notice, evidence was tendered of the custom of the country to quit at Old Michaelmas Day (Oct. 11), and not at New Michaelmas (Sept. 29); but per *Erle* C.J.: "That evidence is inadmissible the custom of the country cannot be set up against the legal presumption, that Michaelmas means any other day than September 29. It must be shown by direct evidence that this is an Old Michaelmas tenancy.

Effect of contract to repair.—There is no implied contract to use premises in a tenant-like manner where tenant has expressly contracted to repair (*Standen* v. *Christmas*).

Tenant in residence not bound to accept agreement for lease when house is found seriously defective.—A tenant under an agreement to take a lease of a house is not bound to accept it (although he has entered into residence) if the house upon a competent survey is found defective and finished in such a manner, that it is likely to subject the tenant under the covenant to repair to an unusually large annual outlay to maintain it: per *Romilly* M.R. (*Tildesley* v. *Clarkson*).

Evidence of oral agreement that written agreement shall become void in a certain event.—The declaration stated that the defendant agreed to transfer a farm held by him under Lord Sydney to the plaintiff, on the terms and conditions under which the same was held by Lord Sydney, and to sell the stock at a certain price, and alleged a breach of that agreement. The defendant pleaded *non assumpsit*, and a contemporaneous oral agreement, that in the event of Lord Sydney not consenting to the transfer, the above agreement was to be null and void, and that Lord Sydney had refused his consent. The principal agreement was in writing, and the plaintiff paid to the defendant £100, a part of the consideration money, and sold with the defendant's consent a small portion of the stock; but when Lord Sydney refused his

consent, the defendant tendered back the £100, which the plaintiff refused to accept. It was held by the Court of Common Pleas that the evidence of the contemporaneous oral agreement was rightly received; for that under the circumstances the inference of fact was that the oral arrangement was intended to suspend the written agreement, and not as a defeasance of it; and that it was not necessary for the plaintiff to produce or cause to be produced at the trial the lease from Lord Sydney to the defendant, referred to in the declaration. And per *Curiam*: "In *Pym* v. *Campbell* (6 El. and Bl. 370, 25 L.J. (N.S.), Q.B. 277), and *Davis* v. *Jones* (17 C.B., 625; 25 L.J. (N.S.), C.P. 91), it was decided that an oral agreement to the same effect as that relied upon by the defendant might be admitted without infringing the rule that a contemporaneous oral agreement is not admissible to vary or contradict a written agreement. It is in analogy with the delivery of a deed as an escrow; it neither varies nor contradicts the writing, but suspends the commencement of the obligation. The evidence shows that the defendant introduced the oral agreement for his benefit, and has treated the written agreement as suspended, having always retained possession of his farm. Also, the subject matter of the two agreements is strong to show that the oral suspended the written agreement from the beginning, and was not in defeasance of it, for the written agreement was to assign, but the possibility of assigning was supposed to depend on Lord Sydney's consent, and the oral agreement that the written agreement should be void if he did not consent, is in its nature a condition precedent. The defendant in effect says, if I have the power to act, I will agree; but if I have no power to act, I will make no agreement at all (*Wallis* v. *Littell*.)

Valuation agreement.—S being possessed of a leasehold farm, entered into an agreement with T, whereby after reciting that T had lent him a certain sum of money and agreed to make him further advances, it was agreed that the said sum, and such sums as should be further advanced, should be repaid on the day mentioned, but if S should not then repay the same, S agreed to assign the farm to T for the residue of the term without any further consideration, together with the furniture and stock at a valuation, and T agreed to pay the amount of such valuation, deducting therefrom the money advanced. The valuation was afterwards made, and the plaintiff entered into possession, but the defendant refused to receive the balance of the money, alleging that the agreement was for a mortgage and not for a sale, and T filed a bill for specific performances. The Master of the Rolls considered that the agreement was for a mortgage of the said farm, and made a foreclosure decree, and directed an account accordingly; but the Lord Chancellor held, on appeal, that the relation of seller and purchaser was constituted by the agreement, and that the plaintiff was entitled to specific performance (*Tappley* v. *Sheather*).

Costs abiding event of reference.—Where an action for alleged breaches of covenant in a farming lease, in which the plaintiff claimed £100 damages, was, after pleas but before issue joined, by a Judge's order and by consent, referred to arbitration, "the costs of the reference to abide the event," and the arbitrators found in favour of the

defendant on all the alleged breaches, with the exception of one, on which they awarded 16s. damages to the plaintiff, it was held by the Court of Exchequer that the event of the reference was in favour of the defendant, and that the plaintiff was not entitled to his costs (*Kelcey* v. *Stupples*).

Liability of agent for non-fulfilment of agreement.—The defendant, *bonâ fide* believing he had authority, verbally agreed on behalf of the owners to let the plaintiff a house for seven years; and the plaintiff was let into possession by the defendant, and began repairing the premises. The owners had not given the defendant authority, and they informed the plaintiff of this, and brought ejectment against him; the plaintiff consulted the defendant, who persisted that he had authority, and advised the plaintiff to defend the action, and a verdict passed against him. The plaintiff having brought an action against the defendant for his breach of warranty of authority, it was held that the plaintiff could not recover the costs of defending the ejectment, as they were not the consequence of the defendant's breach of warranty, inasmuch as if the defendant had had authority, the plaintiff could not have succeeded in the ejectment by reason of the agreement being verbal only, and consequently creating no more than a tenancy at will. And per *Cockburn* C.J.: "The plaintiff's remedy, if any, was by going to a Court of Equity, and compelling the landlords to execute the necessary documents to complete his title, and if he had been defeated in that application in consequence of the defendant's authority being negatived, the defendant might have been justly charged with the costs, as the consequences naturally following from the breach of warranty." And per *Crompton* J.: "This action is brought on the principle established by *Collen* v. *Wright* (7 E. & B. 301, and 26 L.J. (N.S.), Q.B. 147, and in Error 8 E. & B. 647, and 27 L.J. (N.S.), Q.B. 215), in this Court and in the Exchequer Chamber, that an agent who holds himself out as authorised to contract for another, warrants his authority and is liable for the damages flowing from the breach of such warranty, and the question is whether my Brother Blackburn was right in holding that the damages in the shape of the costs of the ejectment, did not naturally flow from the breach of the defendant's warranty. I think that he was right; the ejectment would have been wrongly defended whether the defendant had authority or not." And *semble* per Blackburn J.: "The mere fact of the tenant having laid out money on the premises, with the sanction of the landlord, does not create at law any tenancy other than a tenancy at will" (*Pow* v. *Davis*).

Agent cannot let on unusual terms without cognisance of owner.—A farm bailiff or agent who was used to let farms upon the ordinary terms, and received the rents, &c., was held by *Blackburn* J., to have no authority in law to let upon unusual terms unknown to the owner; and the question was left to the jury as one of fact, whether he had express authority or had been held out by the defendant as having had it (*Turner* v. *Hutchinson*).

Ratification of agent's bargain by employer.—An agent to receive rents and manage property, having without actual authority agreed

that his employer should take the stock, &c., of an outgoing tenant at a valuation, and the valuation included eatage of fields, in which the employer's cattle were afterwards placed by his servants, and *with his knowledge*, such conduct of the employer was held by *Byles* J., to be a ratification of the *whole* valuation (*Rodmell* v. *Eden, Bart.*)

Wrong information to tenant by receiver as to length of term.—The receiver of an estate in which the plaintiff had an equitable interest under a settlement, vesting it in trustees, let defendant into possession under an agreement with himself in writing in which he described himself as agreeing on behalf of the estate to let for a term of years, whereas the plaintiff would only sanction a yearly letting. A correspondence ensued between him and the defendant, in which the latter intimated that as he could not get a lease, he should leave as soon as he could, and he did leave before he had been six months in possession. He was held not liable to the plaintiff in trespass or use and occupation, and *semble* not at all (*Sloper* v. *Saunders*).

Representation by agent that he had authority to contract.—In an action against an agent on the implied warranty, that he had authority to contract with the plaintiff, the plaintiff is entitled to recover, as special damage, the costs of an unsuccessful action against the alleged principal on the contract (*Randell* v. *Trimen* 25 L.J. (N.S.), C.P. 307), or of an unsuccessful suit for specific performance, (*Collen* v. *Wright*), and the liability to pay such costs is, if properly charged in the declaration, sufficient to sustain the claim for special damage (*Randall* v. *Raper*, 27 L.J. (N.S.), Q.B. 266). In *Randell* v. *Trimen*, the defendant was clearly liable for his misrepresentation as to his being authorised to order stone in the name of the clergyman who was the head of the Werneth Church Committee, even though he were honestly mistaken. In *Smout* v. *Ibury* (10 M. and W. 1), there was no representation at all and no assumption of authority by the defendant, and the plaintiff was misled by a circumstance equally without the knowledge and beyond the control of both parties. The plaintiff, like the defendant, did not know that the defendant's husband was dead in foreign parts, and the defendant was therefore not liable for goods supplied to her after his death, but before information of his death had been received.

Guarantee of solvency of tenant by house-agent.—Where a house-nt is employed to let a house, and charges 5 per cent. commission on letting it, it is a question for the jury whether he undertakes to use reasonable care to ascertain that the person to whom he lets it is in solvent circumstances (*Heys* v. *Tindall*).

Assignee of mortgagor letting tenant into possession.—The assignee of a mortgagor, who has let a tenant into possession after the mortgage, can sue such tenant for use and occupation, notwithstanding notice from the mortgagee to pay rent. A mortgagor in possession agreed to grant a lease to the defendant with the privity of the mortgagees, who, however, were no party to the agreement; the defendant was let into possession under the agreement, and paid rent to the mortgagor. The mortgagor then assigned to the plaintiff, who sued the defendant, after notice to him from the mortgagees to pay them the

rent, for use and occupation, and it was held that the action was maintainable; and per *Martin* B.: "The doctrine that a tenant shall not be allowed to deny the title of his landlord is sound, and ought to be supported. It compels persons to perform their contracts until something has taken place, which in justice ought to put an end to them. The dictum in *Gowldsworth* v. *Knight* (11 M. &. W. 337), supposed to be contrary to that doctrine, was merely the expression of an opinion and not duly considered." And per *Bramwell* B.: "The sole question is whether the mere notice was sufficient to terminate the estoppel arising by tenancy? We think it was not. That the assignee of a reversion on a parol tenancy can sue for the rent has been held in *Standen* v. *Christmas* (10 Q.B. 135, 16 L.J., Q.B. 265)," (*Hickman* v. *Machin*).

Fixtures.—M being owner of certain land and premises, mortgaged them in fee, but still continued in possession of the mortgaged premises, on which, subsequently to such mortgage, he put up and used for the purposes of his trade a steam engine and boiler, also a hay-cutter and corn-crusher, and grinding-stones. All these articles except the grinding-stones were screwed, or otherwise firmly fixed to the several buildings to which they were attached, but still in such a manner as to be removable without damage to buildings or themselves, and the upper millstone lay in the usual way on the lower. The steam-engine and boiler were used for supplying with water certain baths on the premises; the hay-cutter was attached to a building adjoining the stable to improve its usefulness as a stable, and the malt-mill and grinding-mill were to add to value of premises. In an action by the assignees in bankruptcy of M it was held by the Court of Common Pleas *Willes* J. *dub.*, that the articles were fixtures, and that although they were trade fixtures as well as annexed to the freehold after the mortgage, they enured to the benefit of the mortgagee, and did not pass to the assignees of the mortgagor (*Walmsley* v. *Milne*).

Annexation of chattel to another's freehold.—The mere annexation of a chattel by its owner to the freehold of another, does not necessarily make it the property of the freeholder; but in each case it may be a question whether the owner of the chattel has lost his property in it (*Wood* v. *Hewitt*), which governed *Lancaster* v. *Eve.*

Landlord's claim for rent under a fi. fa.—The sheriff on a levy under a fi. fa. is liable to the landlord's claim for rent under 8 Anne, c. 14, while the goods remain in his hands, *even* after sale, and the claim may be made by a mortgagee to whom the mortgagor has attorned as tenant for rent, payable in advance although no interest has become due. And per *Channel* B.: "As long as the goods are in the sheriff's hands, the landlord's claim attaches; and even if he has sold and received the money, the claim attaches to the proceeds in his hands" (*Yates* v. *Routledge*).

Presumptive proof that payments were made as rent-charge for common land.—In an action by overseers, for use and occupation, and for rent of parish lands, evidence that the defendant and his ancestors had for upwards of a century, up to the last ten years, paid rent for the land as "common lands" (he refusing to produce the deeds under

which he professed to hold), is evidence sufficient to go to the jury, in the absence of any evidence that the payments were made by way of chief rent or rent-charge (*Harden* v. *Hesketh*).

Right of presumptive heir to rents up to birth of posthumous son.—The right of a presumptive heir to the rents which accrue due between the death of an ancestor and the birth of a posthumous heir, extends to all rents which have accrued due in the interval, and whether actually received or not, and whether in respect of fee simple or entailed estates (*Richards* v. *Richards*).

Tenants in ancient demesne liable to pay county rates.—Tenants of land in ancient demesne are not by reason of their tenure exempted from liability to pay county rates (*Reg.* v. *Inhabitants of Aylesford*).

Receipt of rent from third party evidence of surrender by operation of law.—It was held by *Blackburn* J., in *Lawrance* v. *Faux*, that receipts for rent received by a landlord from a third party were held evidence of a surrender by operation of law, putting an end to the liability of the former tenant.

The holding over to entitle to double value must be contumacious.—B, a tenant to S, after the death of S accepted a fresh term from his devisee. He afterwards found that the heir-at-law of S disputed the will, and from the circumstances of the case, he reasonably and *bonâ fide* believed that the devisee had no title, and that the land belonged to the heir-at-law. B thereupon refused to pay rent to the devisee, who gave him notice to quit. As B did not quit at the expiration of his term, the devisee, who had made out her title to be good, brought an action against B, under statute 4 Geo. II., c. 28, s. 1, for double value. It was held by the Court of Exchequer that to enable a landlord to recover double value under 4 Geo. II., c. 21, the holding over must be contumacious. A holding over under a mistaken belief that a third person who claimed the reversion is entitled, is not sufficient to support the action, even although the tenant was let into possession by the landlord, and the third person does not claim through, but adversely to him. This was decided on the judicial construction given to the statute in *Wright* v. *Smith* (5 Esp. 203), and *Soulsby* v. *Neving* (9 East. 310). This decision was affirmed in the Exchequer Chamber, which considered that the action was not maintainable, and that to come within the statute the holding over must be with the consciousness on the part of the tenant that he has no right to retain possession (*Swinfen* v. *Bacon*).

Ejectment by mortgagor.—A mortgagor before mortgage let a farm to P as tenant from year to year. After the mortgage, P let the defendant into possession in his stead, and informed the mortgagor of the fact, and the mortgagor subsequently received rent from the hands of the defendant. It was held that the tenant's term was still in P, there being no effectual surrender, and consequently that the mortgagee could not maintain ejectment against the defendant without a notice to quit. And per *Martin* B.: "There can be no assignment of a term except by deed, and there cannot be a surrender by operation of law without the assent of all parties" (*Trent* v. *Hunt*.)

Action by one tenant in common against another.—Where one tenant

in common brings an action against his co-tenant, and the declaration takes no notice of the plaintiff's limited interest, but alleges an expulsion or total destruction, the defendant may pay money into court in respect of the damage to the plaintiff's share; and as to the residue, plead *liberum tenementum*, or traverse the plaintiff's property (*Cresswell* v. *Hedges*).

Taking farm and paying tenant-right to false devisee.—A defendant who had taken a farm without any agreement, but by arrangement for a yearly tenancy, he paying the usual tenant-right, which included a valuation for dung for which £62 was paid to the person in possession and claiming as devisee under a will, was held by *Williams* J. liable in trover when the will was set aside to the plaintiff, who took out letters of administration, as the personalty vested in him by relation (*Learson* v. *Robinson*).

Laying out trust-moneys on improvements.—Where it is desired to obtain the sanction of the Court to the laying out of trust-moneys in permanent improvement upon the trust property, the proper course is to file a bill, and not to state a case under Lord St. Leonard's Act, 22 & 23 *Vict.* c. 35, the Court not being authorized under that act to go into evidence as to the propriety of the expenditure, or to exercise any control over the subject matter (*Re Barrington's Settlement*). As to taking accounts of trustee of farm—see *Kendall* v. *Masters*.

Incumbent borrowing money on mortgage to enlarge parsonage-house, &c.—An incumbent may borrow money upon mortgage under the provisions of the act 17 *Geo.* III. c. 53, for the purpose of adding to and enlarging the parsonage-house, as well as for "building, rebuilding, and repairing" if such additions are considered necessary; and there is no objection to the incumbent advancing the money himself on mortgage for such a purpose, *per Kindersley* V.C. (*Boyd* v. *Barker*).

Enforcing specific performance of farming agreement.—An agreement for a farming lease was entered into in October, 1855, for twelve years. In February, 1859, the landlord gave notice to quit, on the ground of the lands not being farmed according to the agreement. In November, 1859, the tenant paid the balance of rent up to the previous Michaelmas, the receipt expressing that it was without prejudice to any question. In December, 1859, an action of ejectment was commenced, and thereupon the tenant filed a bill for specific performance of the agreement, and to restrain the action; the evidence as to the tenant's farming was conflicting. A decree was made by one of the Vice-Chancellors for specific performance of the agreement; the lease to be dated in October, 1855, and the tenant to admit in any action for breach of covenant that the lease was executed at that date, and an injunction to restrain the action was granted, and on appeal this decree was confirmed. And *per* Lord Chancellor *Campbell*, affirming *Stuart* V.C.'s decree: "The cases of *Gregory* v. *Wilson* (9 Hare 683, & 22 L. J. (N.S.) Ch. 159) and *Lewis* v. *Bond* (18 Beav. 85) are well decided; and I mean entirely to be bound by the doctrines there laid down. If there has been a breach of the agreement, and if there has been what would have amounted to a breach of the covenants which ought

to have been introduced into the lease had the lease been granted, which would have worked a forfeiture, and that is clearly made out, then there is an answer to the bill, and specific performance should not be decreed. But if that is not made out, then I think the proper course to be adopted is that which was adopted in the two cases that have been referred to, of *Pain* v. *Coombs* (1 De Gex & Jo. 34) and *Lillie* v. *Legh* (3 De Gex & Jo. 204), which is to decree specific performances, and to direct that the lease should bear date at the date of the agreement, giving the landlord the opportunity, if he thinks fit, of bringing an ejectment for the forfeiture, and so to recover possession of the premises." His lordship added: "There is considerable difference of opinion as to the four-course system and what constitutes a breach of it, particularly with regard to fallow; what would be a breach of the covenant that they should lay fallow one year; whether a green crop is allowed, and what green crop is allowed (*Rankin* v. *Lay*).

The stat. 5 *Vict.* sess. 2 c. 27, for better enabling incumbents of ecclesiastical benefices to demise the lands belonging to their benefices upon farming leases, does not abridge any right of leasing formerly enjoyed by the incumbent, and so it was held in full Court of Appeal (*Green v. Jenkins*).

Letting by incumbent.—An agreement to let a farm less a stated number of acres will be supported in equity, though the lands to be excepted were not specified. A rector agreed to let a farm, except 37 acres, with liberty to plant not more than 10 acres of ground. The tenant took possession; but before the lease was executed, disputes arose respecting the lands to be taken by the rector; and on a bill filed against the tenant for a specific performance of the agreement, it was held by Sir J. *Romilly* M.R. that the rector had a right to select the lands to be reserved, as the lease had not been executed; but that had it been executed, the rector could not have taken any lands without the concurrence of the tenant. It was held also that the right of selection must be exercised so as not to prevent the useful occupation of the rest of the farm; and with these declarations, a decree was made for a specific performance of the agreement (*Jenkins* v. *Green*).

If a farmer contracts with a rector for a lease of glebe lands the Court will not assume that both parties had an enabling statute present in their minds, and modify the express terms of the agreement to make it conform to the provisions of the statute. Where an agreement had been made by a rector to grant a lease of glebe lands at a rent to be paid half-yearly, the Court will not vary the agreement in accordance with the provisions of 5 *Vict.* sess. 2 c. 27, and direct the rent to be paid quarterly. A decree was made for the specific performance of a lease of glebe lands. The decree was duly enrolled; it was, however, subsequently found that the agreement and the statute enabling incumbents to grant leases of their glebe land did not conform. It was held by Sir J. *Romilly* M.R., notwithstanding the previous proceedings, that the bill must be dismissed, but without costs (*ib.* Ch. 280). And glebe lands which have been usually let on lease

by incumbents are not within the 5 *Vict.* sess. 2 c. 27 (*ib.* Ch. 822). If an incumbent contract to let lands belonging to the benefice for a term of years, his resignation of the living during the term is a breach of his contract (*Price* v. *Williams*).

Lessees of farm bound to deliver lease to tenant who took it off their hands.—On a contract by a letter of the defendant, assented to by the plaintiffs to take a farm off their hands, provided he was accepted by their landlord on the covenants in the lease, it was held by *Blackburn* J. that they were bound to procure and deliver to him the lease; and it having been deposited as security for a loan, and they not having procured it, the plaintiffs were nonsuited (*Burton and Another* v. *Banks*).

Chapter XIV.

CONTRACTS AND SALES.

Omission of statement in fire insurance policy.—A fire insurance policy contained a condition that it should be void "unless the nature and material structure of the buildings and property insured, and of all buildings which contain any part of the property insured, be fully and accurately described, and unless the trades carried on in such buildings be correctly shown, or if any alteration or addition be made in or to any buildings insured, or in which any insured property be contained by which the risk of fire is increased." The policy stated that a steam engine was erected on the premises, which was used for the purpose of raising goods; machinery had also been erected for grinding corn for horses, which was driven by the engine, and the Court of Exchequer held that the omission to state this fact did not violate the condition (*Baxendale* v. *Hardingham*).

Owner of market liable for nuisance from the droppings.—The owner of a market allowed sheep to be penned there, and he found the hurdles for the pens, and derived a profit in addition from the toll on the sheep, whose droppings created a nuisance on the part where they were penned. It was held by the Court of Common Pleas that the appellant, the owner of the market, was liable to an order for the removal of the nuisance under section 12 of the Nuisances Removal Act (18 & 19 *Vict.* s. 121), as being the person within the meaning of that section, "by whose act, default, permission, or sufferance" the nuisance arose. And *per Willes* J.: "It is clear that the owner of the market was not bound to provide that accommodation, and the persons bringing their sheep to the market have no right to pen them without the permission of the owner of the soil. It is an enjoyment of the soil of the market; and the distinction between the right to such enjoyment and that to the general franchise is pointed out by *Lee* C.J. in the *Mayor of Northampton* v. *Ward* (2 Strange 1238), and the authorities there referred to, where he says stallage "is defined to be a satisfaction to the owner of the soil for the liberty of placing a stall upon it; and if in the erecting one the soil is broken, it is called piccage" (*Draper* appt. v. *Sperring* resp.).

Cattle fair not to be held on piece of ground put by for recreation by Corporation.—Where by an Act of Parliament a corporation were directed to cause a piece of land to be drained and levelled, and kept in proper condition for purposes of public recreation, the Court restrained the corporation by injunction from permitting a cattle fair

to be held on such piece of ground. For the defendants, it was contended that a fair was originally a feast or festival, and passages in support of this view were cited from Gay's poems and the prologue to Tennyson's "Princess"—*per Stuart* V.C. (*Attorney General* v. *Corporation of Southampton*).

Selling horse within limits of market.—By a local act for establishing a market, power was given to the proprietors of the market to take tolls on horses brought into the market place; and by one of its clauses it was enacted that every person who should sell at any place within the limits of the act (other than in the market-place, or in his own dwelling-house, or in any shop attached to or being part of any dwelling-house) any article in respect of which tolls were by the act authorized to be taken, other than eggs, butter, and fruits, should forfeit a sum not exceeding 40s., provided that nothing therein should restrain any person from crying or selling from door to door within the limits of the act any such article as aforesaid, provided such person should have first paid for such articles the regular market tolls, and provided such articles should first have been brought into the market for inspection there. It was held that *a horse* was an article within the meaning of such clause, and that a sale of horses within the limits of the act by a licensed auctioneer in a yard which formed part of the dwelling-house and premises of a third person subjected the auctioneer to a penalty of 40s., the place of sale not being within the exception contained in such clause (*Llandaff and Canton District Market Company* appts. v. *Lyndon* resp.)

Warranting turnip seed to be rape seed.—An action by seed merchant lies against seed brokers for falsely warranting turnip seed to be rape seed, although it was sold by sample, and was of greater value than turnip seed, the plaintiff having sustained actual loss and injury in his business, from having resold it as rape seed, and having to compensate his customers. *Per Keating* J. (*Lovegrove* v. *Fisher*).

Warranty of Seed.—In *Pinder* appt. v. *Button* resp., the action was for damages sustained by the appellant having contracted to sell to the respondent a quantity of mangold-wurzel seed warranted to be of good growing stock, and having delivered seed not according to such warranty. The memorandum signed by appellant was merely, "Sold Mr. Button half a ton of yellow mangold wurzel seed, at 9d. a lb., for the latter end of the year." Respondent was allowed to give parol evidence that appellant said the seed was to be sown by himself, and be of "good growing stock." Several of respondent's customers were called to prove that the seed was "unproductive and worth nothing," and there was some evidence, although the appellant denied it, that the seed when delivered by the appellant was kiln-dried, and therefore injured. It was admitted that the season of 1860, when the bargain was made, was very wet and unfavourable, and also that there was no fraud. For the appellant, it was contended that there was no warranty, and no evidence of the quality or unproductiveness of the seed. The learned judge of the Lincoln County Court ruled "that there was necessarily an implied warranty that the seed would grow," and gave a £50 verdict for the respondent; and The Court of Queen's Bench

gave judgment for the appellant. And *per Cockburn* C.J.: "It does not appear that the seed delivered was dead or bad, or had wholly lost its character as seed, but only that it had a defective germinative or reproductive power. We are not called on to decide whether on a general contract for seed there is an implied warranty that it is growing seed. This is not such a contract; it is a special contract for such seed as the appellant should raise from seed 'of a good growing stock.' It is not denied that the seed he delivered was fairly raised from such seed "of a good growing stock;' and there being an express warranty, there can be no warranty implied beyond it. It was agreed that the appellant should sow a certain quantity of mangold wurzel seed on his own land of 'a good growing stock,' and should sell the respondent the seed raised therefrom. There is nothing to show that he has not done so; and if so, the only warranty he gave has been complied with. The judgment of the County Court, therefore, was wrong, and this appeal must be allowed."

Risk of vendee in absence of express warranty.—Although a vendor is informed of the purpose for which a material is required, yet if the vendee inspects it, its unsoundness or unfitness for the purpose, in the absence of any express warranty, is no defence to an action for the full price; *per Cockburn* C.J. (*Fitzgerald* v. *Iveson*).

Damages for selling manure not corresponding with warranty.—W, being agent to sell for two distinct principals, H and defendant, both dealers in manure, contracted with plaintiff to take back manure which as agent for H he had supplied to plaintiff, on condition that plaintiff would take certain other manure which defendant dealt in instead, and which W warranted, it being, as the jury found, usual to sell such manure with a warranty. Defendant executed the order for the latter manure, and received payment from plaintiff, who was also a dealer in manure, and, as defendant knew, purchased to sell again. Plaintiff having resold the manure to different purchasers, was threatened with an action by one of them for loss sustained by reason of the manure being, as was proved, of an inferior quality, and plaintiff made good the loss, but no complaints were made by the other purchasers. It was held, first, that defendant was liable to plaintiff in an action on the warranty given by W; secondly, that the difference between the value of the manure supplied and its value if it had been according to the warranty was a correct measure of damages. And *semble*, that the loss which the plaintiff made good to his vendee was damage naturally arising from defendant's breach of contract, and for which he was liable to the plaintiff; and *semble*, that if the two contracts made by W with plaintiff were to be considered as only one, plaintiff had sufficient interest in it to maintain the action. The jury gave the ordinary measure of damages—*i. e.*, difference between the actual value and the value guaranteed (*Dingle* v. *Hare*).

Where warranty not implied.—The sale of an article not by sample, but by a particular description, does not necessarily import a warranty, if all the circumstances show that it was understood as a mere expression of opinion or belief; and words having a known natural meaning can have a particular meaning attached to them, as prevailing

in a certain trade, only by clear evidence, as a matter of fact, of their general use and acceptation in such meaning. The defendant, a corn dealer, sold to the plaintiff, also a corn dealer, barley by sample, which he called "seed barley," but which he had himself just purchased by sample, not having seen the bulk, and, as the plaintiff knew, being ignorant of what sort it was. It turned out to be an inferior kind of barley, and different from ordinary seed barley. There was no evidence that in the corn trade the words "seed barley" had acquired a particular meaning, though there was evidence that it had in the locality such a meaning. It was held that there was no evidence of a warranty, nor of a contract for anything else than what the words naturally imported, viz., barley seed which would grow; and such barley having been delivered, that there was no cause of action. The rule to set aside the nonsuit was discharged. And *per Martin* B: "There was no warranty. A warranty is an absolute engagement that the article sold is of a particular quality or kind, and will answer a particular purpose. Here there was a mere expression of opinion or belief. The defendant had negotiated for a quantity of barley, which he believed to be 'seed barley,' and sold, as he had bought, by sample; saying that he believed it to be seed barley, but did not know what sort it was. Assuming, even, that the words 'seed barley' meant what the plaintiff maintains, still, if it was understood that there was a purchase of the article which was *shown*, it would be the same if any other name had been given to it. If we could see that 'seed barley' was an article well known and commonly sold as such, then it might be that the sale of barley by that name might import a warranty. But it was not so here. And as to the damage, even if there was a breach of warranty, it would only be nominal, for the plaintiff brought his loss upon himself by warranting the barley as 'Chevalier' or a certain particular quality." (*Carter* v. *Crick*).

No implied warranty that meat fit for food.—There is no implied warranty that an article exposed for sale as human food is fit for that purpose; and if a meat salesman in Newgate market exposes a carcase for sale which, in consequence of some latent defect of which he is ignorant, is unfit for human food, he is not liable to a penalty under section 52 of 14 and 15 *Vict.* c. 91 for selling it, nor, in the absence of any fraud on his part, will an action on the case for deceit lie against him; nor will an action to recover the price lie by a purchaser, who, believing it to be fit for human food, has purchased it to sell to retail customers. And *per Curiam:* "The undoubted general law is that, in the absence of all fraud, if a specific article is sold, the buyer having an opportunity to examine it and selecting it, the rule of *Caveat emptor* applies, (*Chawler* v. *Hopkins*, 4 M. & W. 399, 8 L. J., N.S., Ex. 14, *Parkinson* v. *Lee*, 2 East 314, and *Morley* v. *Attenborough*, 3 Ex. 500, and 18 L. J., N.S., Ex. 148), and the plaintiff has to establish that in the case of a salesman dealing with a retail buyer there is an exception to the general rule, and that there is an implied warranty that the meat is fit for the purpose for which probably it is bought. None of the cases cited decide this case, although in *Burnby* v. *Bollett* (16 M. & W. 646, 17 L. J., N.S., Ex. 190) all the law is examined and

collected, and the matter was much discussed. We are of opinion that a salesman offering for sale a carcase with a defect of which he is not only ignorant, but has not any means of knowledge (the defect being latent), is not liable to any punishment, and does not, as a matter of law, completely warrant that the carcase is fit for human food, and is not bound to refund the price of it should it turn out not to be so" (*Emberton* v. *Matthews*).

Selling bad meat.—A meat salesman can be indicted and convicted *at common law* for *knowingly* sending or exposing meat for sale in a public market as fit for human food, which in fact was *not* so, and the defendant was imprisoned for six months: *per Willes* J. (*Reg.* v. *Stevenson*).

Carrying bad meat.—A carrier can be indicted and convicted at *common law* for *knowingly* bringing to market meat unfit for human food: *per Gurney* R. (*Reg.* v. *Jarvis*).

Absence of intent to sell bad meat for food.—A person is not indictable for sending to a meat salesman meat he knows to be unfit for human food, if he does not intend (as appeared in this case, from the evidence of a bone-boiler called by the defendant) that it is to be sold for human food—*per Willes* J. (*Reg.* v. *Crawley*).

Sending bad cider to customer.—A cider merchant at Cheltenham sold to the defendant, a publican in London (to be delivered to him there), a hogshead of cider warranted "good" and "prime." A hogshead being delivered, it was tapped, and found unfit for use. The defendant at once wrote to the plaintiff that the little he had sold was complained of, and that if it continued to be so he should have to return it. No notice was taken of this letter for about a month, during which period the defendant was trying to sell it, and found it unsaleable. He then wrote to the plaintiff, proposing to return the hogshead, but the plaintiff refused to assent to this, and sued the defendant for the price. The defendant paid into court the value of the part he had used, and was held not to be liable for the residue, and *semble* for none (*Lucy* v. *Mouflet*).

Selling sulphured hops.—The defendant, a hop merchant, entered into a contract with the plaintiff, who was a hop grower, for the purchase of hops by sample. Inasmuch as the defendant could not sell hops to his customers if sulphur had been used in their growth, he inquired of the plaintiff at the time of making such contract if sulphur had been so used, and the plaintiff stated that it had not, and thereupon the contract was made. The plaintiff knew of the objection by hop merchants to sulphured hops, and the defendant would not have bought the hops if he had been aware that sulphur had been used, as it was admitted it had been in 5 acres out of 300, and the sulphured hops mixed with the unsulphured afterwards. It was held by the Court of Common Pleas that the contract was conditional on sulphur not having been used in the growth of the hops; and that if sulphur had been so used, the defendant was at liberty to reject the hops, although they corresponded with the sample by which they had been sold. And *per Byles* J.: "The case of *Nichol* v. *Godts* (10 Ex. 191, & 23 L. J., N.S., Ex. 314) comes very near to the present one.

Although that was the sale of an ascertained article, foreign refined rape-oil, which corresponded with the sample, the Court held that the vendee might return it on its not answering to the description by which it was sold" (*Bannerman* v. *White*).

Selling refuse cake.—It was held by *Pollock* C.B., in *Jackson* v. *Harrison*, that seed-crushers who sold the refuse cake when the oil had been expressed from the linseed to farmers for oilcake, but without any description as cattle food, or any express or actual warranty as such, and without, so far as appeared, anything being said as to its use, or any intimation that it was bought for that purpose, are not liable on an implied warranty that it was good for cattle food, when the cows died (from its mechanical, and not chemical action) after eating it.

Adulterated seed.—In *Davy* v. *Gillett*, which was tried in the Common Pleas at Westminster, the verdict turned on the amount of burnet seed among the 5½ qrs. of sainfoin sold by the defendant to the plaintiff, without a sample or a warranty.

It was allowed by the skilled witnesses on both sides that you would expect to meet with burnet in every sainfoin sample; but according to the testimony of the witnesses, and Prof. Buckmann especially, who thought it was a crop of burnet, the per-centage in the seed purchased by the plaintiff was very great. The seed was duly drilled in with barley in the February of 1858, and fed with sheep that autumn, mown in 1859, fed again in 1860, and then ploughed up as being perfectly useless, instead of running out its five or six years; and at the end of that time the plaintiff applied to the defendant for compensation, and wished for an arbitration by a mutual friend, who fixed the claim for compensation at a most moderate figure. The defendant declined all such overtures, and principally relied on the claim being a stale one, in consequence of the lapse of time, and on the fact that the plaintiff, instead of merely running his lambs over the sainfoin after the barley was cut, had folded sheep on it, who had eaten the very heart out of it, and laid the foundation for lob and other weeds among the plants next spring.

The general tenor of his evidence went to show that no sainfoin samples were now free from a very great admixture of burnet, and that no purchaser could expect it. In shape the two seeds are very distinguishable, as the sainfoin is oval and the burnet has four angles; and while the former costs 2s. 2½d. a lb., the latter costs only 1s. The seedsmen's theories were very various. One had seen more than one part in five burnet; another thought a fourth or a fifth a fair sample, but had never seen less than a fourth, and did not expect, on an average, to get less than a sixth in it; while some said an eighth or a tenth. A great Strand dealer "would not give a fourth burnet if he knew it. I should not have done you justice if I did." In fact, he went so far as to say he would not sell it if it was in that state, but would clean it. Another eminent dealer said that he might send three or four per cent. out in his samples, but certainly not more than five; and has for twenty years past only recommended milled seed, *i. e.*, set loose from the shell. He added, there "has not been much more burnet of late years, but there has been much more noise made about it. If I was

asked for *pure* sainfoin, I would not send it at all; if I was asked for the best, I'd send the best I had." He, however, thus qualified the last remark on cross-examination: "I should not do you justice if you paid me the best price and I sent you one-fourth burnet." The plaintiff as it happened, had paid the top price, 52s., in 1858, and hence this witness virtually settled the question against the defendant who called him. Mr. Justice Keating asked the jury to consider was it such seed as would answer to the agreement between the parties, or was it such as might be reasonably sold for sainfoin seed. The jury, after a very short consultation, found for the plaintiff for the £41 6s. 9d. claimed. On the count charging fraud there was a verdict for the defendant, as there was not the smallest ground for attributing to him anything of the kind. The seed was proved to have come to him direct from Mr. Forshaw, a very aged and infirm farmer in the neighbourhood (whose health alone prevented him from travelling up to speak to the fact), and had been passed on at once to the plaintiff.

Recovering difference between sale and market price where sheep not delivered.—The plaintiff having contracted with the defendant to buy of him a lot of 48 sheep at 53s. a head (less than the market price at the time), to be paid for on delivery, took away five, for which he paid in a day or two, and agreed to take the rest in a fortnight. Within that time, before any application for the remainder, the defendant sent them away and resold them. The vendee then within a fortnight applied for 19 "to make half the sheep at half the time," offering to pay for them, and finding that they were re-sold sued the vendor on the contract and also in trover. It was held that he was not entitled on either count to recover the full value, but only the difference between the price he was to have paid for them, and the market price when he was entitled to them, and the rule was made absolute to reduce the damages on the second count from £118 19s. to £5. And per *Curiam*: "It is to be understood that though in a case like this the plaintiff may not recover more than this, it is possible that if a stranger had converted the goods, the plaintiff would have been entitled as against him, to recover the whole value of the amount or proceeds. That might depend upon whether the plaintiff would be liable to the seller, for the contract price; but probably in such a case, he would be, for there the seller would be in no default; and if he could not deliver the goods, owing to the wrongful act of a third party, it may be that he could recover the whole price, and that the vendee would be entitled to recover the whole from the stranger" (*Chinery* v. *Viall.*)

Violation of consignor's orders to carrier as to delivery.—Although the consignor of goods directs a carrier to deliver them to the consignee at a particular place, the carrier may deliver them wherever he and the consignee agree. The plaintiff having sold corn by sample to be delivered to the purchaser at his mill at B——, sent the corn by the defendant's railway, carriers paying the freight to B—— station, and an extra sum for cartage from B—— to the mill. In pursuance of general orders previously given by the consignee to the defendant, but not communicated to the plaintiff, the defendants left the wheat at their station at B, and advised the consignee of its arrival, who examined it,

but left it there for two months, and afterwards refused to take it. The wheat was deteriorated in quality during that time. It was held that the defendants were not liable to an action by the plaintiff for not delivering at the mill, as the non-delivery there was pursuant to the orders of the consignee, and that it made no difference in this respect that the plaintiff could not recover the price of the wheat from the purchaser, in consequence of there being no acceptance of the wheat within the meaning of the Statute of Frauds; and *semble* the rights of the plaintiff and the purchaser were not affected by the non-delivery at the mill (*London and North Western Railway Company appts.* v. *Bartlett respts*).

Consignee sues for missing goods at place of destination.—Where goods are sent by a carrier, *the consignee is entitled to recover their value at the place to which they are consigned,* as distinguished from the place at which they were delivered to the carrier (*Rice and Another appts.* v. *Baxendale respt.*)

Damages in action for non-delivery, measure of.—In an action against carriers for the non-delivery, according to contract, of goods of a marketable kind intended for sale, the jury may give as *damages the difference between the market value on the day the goods ought to have been brought to market, and the day on which they afterwards were,* although no notice be given to the carriers that the goods were intended for market; for such damages are the natural and immediate consequence of the defendant's act. There is no difference in the application of this rule, between a delay occasioned by the detention of goods in the hands of the carrier, and delay necessary for the purpose of restoring goods to a marketable state, when delivered by the carrier in a damaged condition.

Here the plaintiff sent hops in bags from Kent to London by the defendant's railway, for the purpose of delivery to the vendee, a hop dealer. The hops were detained by the defendants several days, and received some damage by water, and the vendee refused to accept them. The plaintiff dried the hops, and when fit for sale the price had fallen in value. Independently of that, the stained portion of the hops deteriorated the marketable value of the whole, although for the purpose of brewing the value of the bulk was unaffected. It was held by the Court of Exchequer that the plaintiff was entitled to recover, as damages from the defendants, the difference in price of the amount of deterioration in market value, and was not confined to the value of the parts actually damaged, although the defendants had no notice that the hops were sent for the purpose of sale and not for use. And per *Channel* B.: "I think that the doctrine laid down in *Hadley* v. *Baxendale* (9 Ex. 341, 23 L.J. (N.S.), Ex. 179), by this Court does not apply to this case, and I also agree in the decision of the Court of Queen's Bench in the case of *Smeed* v. *Poor* (28 L.J. (N.S.), Q.B. 178), which seems to me to be perfectly distinguishable from this case [in each of the above cases the damages were consequential, but here there was a strict diminution in value.] In *Smeed* v. *Poor* the Court admitted that the plaintiff was entitled to recover compensation for all heads of damage directly resulting from the non-delivery of the thrashing

machine; but what was attempted to be recovered there, and what the Court held was not reasonable, was in my opinion not at all necessarily consequential damage from the non-delivery of the thrashing-machine. Here the hops were delivered in a damaged condition, and I agree in the statement that there is no difference between their being delivered in a damaged condition for the purpose of this enquiry, and then having been kept in the defendant's own premises, as from the facts found by the jury, for all purposes, it is precisely the same as if they had been in the defendant's possession, and not in the plaintiff's. At the time they became available to the plaintiff as goods for sale, the market had fallen from the defendants not performing their contract; if there is, therefore, any case where that can be treated as damage, this is a case of that description. This seems to me to be the test by which you must endeavour to ascertain the damages; if you cannot resort to this test, I own I do not know to what test you can resort. I am therefore of opinion that the rule in this case should be discharged" (*Collard* v. *South Eastern Railway Company*).

The measure of damages for non-delivery of goods by a carrier, as laid down in *Hadley* v. *Baxendale*, was approved of by the Court in *Gee* v. *Lancashire and Yorkshire Railway Company* (30 L.J. (N.S.) Ex. 11).

Acceptance of hops.—Plaintiff, a hop grower, sent samples of hops to his factor; and defendants, hop merchants, agreed with plaintiff at the factors' premises to purchase some. The factor made out a bought note, and delivered it to defendants together with the sample. At defendant's request the date of the note was altered to give them longer time for payment. In an action for not accepting the hops, this was held not a sufficient note or memorandum to bind defendants to the bargain within sec. 17 of the Statute of Frauds. The declaration was in assumpsit for refusing to receive hops. The plaintiff accompanied the defendants to the factors, and after bargaining for the sale of the hops at £16 16s. per cwt., the sold note was then given to the plaintiff, and the bought note was, with the sample, delivered to the defendants. In the sold note, the date was October 19th, but 19th was crossed out and 20th substituted at defendants' request, the custom in the hop trade being to pay on the Saturday week after the purchase, so that if the sale had been completed, the payment would have taken place on November 3rd, the defendants obtaining thereby a week longer for payment. On October 23rd, the hops were sent to the factor according to usage, to be weighed. The plaintiff was present, as was also one of the defendants during some portion of the weighing. One of Messrs. Noakes's warehousemen weighed for the plaintiff, and one of the defendants' men acted for them. A dispute having arisen about the weighing, and as to the condition of the hops, the defendants refused to take them at all. In consequence of the badness of the hop season in England, English hops became suddenly almost unsaleable, and on November 3rd they were not worth more than £8 per cwt., although the bargain had been made on October 19th at £16 16s. per cwt. It was contended on the defendants' behalf, that this being a contract for the sale of goods above £10, there was no note or memorandum in writing made by the party to be charged with the contract

or by his agent thereunto lawfully authorised, so as to satisfy the 17th section of the Statute of Frauds, and a verdict for £420 was taken for the plaintiff, leave being reserved to the defendants to move to enter a nonsuit. It was contended that Noakes the factor was as much the agent of the defendants as the plaintiff, just as a stock or sharebroker or an auctioneer would be between a vendor and purchaser, that he made out the usual bought and sold notes, and handed the bought note to the defendant, that the defendants expressly directed him to alter the date, and that there was evidence for the jury that Noakes was acting as the defendants' agent.

In the Exchequer Chamber, the decision of the Court of Exchequer was reversed, and it was held that there was evidence from which a jury might find, that Noakes was the agent of the defendants as well as of the plaintiff to draw up a record of the contract between them, and that if he were, the writing by him of "Messrs. Evans" was a signature binding on the defendants within the 17th section of the Statute of Frauds; and per *Byles* J.: "It seems to me that there was evidence sufficient to sanction a verdict for the plaintiff. It is plain that the signature though not at the foot of the document, but at the beginning, is abundantly sufficient. Then in the first place, was the plaintiff bound by what Noakes did? The Messrs. Noakes were employed by him as factors; there was therefore, no doubt, more evidence against him than against the defendants. But the defendant and the plaintiff knew what Noakes was doing. What does the defendant do? Next of all he sees a duplicate written by the hand of the agent, and he knows it is a counterpart of that which was binding on the plaintiff, he knew what was delivered out to him was a sale note in duplicate, and accepts and keeps it. The evidence of what the defendant did both before and after Noakes had written the memorandum, shows that Noakes was authorised by the defendant; and the case comes directly within the terms of Lord Abinger's judgment in *Johnson* v. *Dodgson* (5 Taun. 786). And per *Keating* J.: "There is abundance of authority from *Lemayne* v. *Stanley* (3 Lev. 1), downwards, that the name appearing on the face of the document is a sufficient signing within the statute." And per *Mellor* J.: "I agree with my brothers *Crompton* and *Blackburn* that *Graham* v. *Marson* (5 Bing., N.C. 603, and 8 L.J. (N.S.), C.P. 324), is not inconsistent with *Johnson* v. *Dodgson* (2 M. & W. 653, and 6 L.J., Ex. 185). In the former case the circumstances failed to raise the question of authority which is raised here" (*Durrell* v. *Evans*).

Delay in delivery of goods may not be set up in reduction of damages on breach of warranty.—In an action for goods sold and delivered, or in an action upon a guarantee of the payment of the price of such goods it is not competent for the defendant to set up in reduction of damages, the fact that the goods were delivered by the vendor to the vendee, after the stipulated time in the breach of the agreement between them. And per *Mellor* J.: "There is a manifest distinction between the principle of *Mondel* v. *Steele* (8 M. & W. 858, 871), and the endeavour to set off damages arising from delay or similar causes" (*Oastler and Another* v. *Pound*).

Putting oil into plaintiff's bottles by defendant passes the property in it.—There was an agreement between the plaintiff and C, for the sale to the plaintiff of all the oil produced from the whole crop of peppermint grown on his farm in the year 1858, and C, after having had the oil weighed, according to contract, and put into the bottles, which the plaintiff had sent to him for that purpose, sold it to the defendant. It was held by the Court of Exchequer, on the authority of *Aldridge* v. *Johnson* (5 W. R., 703), and *Logan* v. *Le Mesurier* (6 Pr. C., 116), that the bottles having been sent by the plaintiff and filled up by C or his agent, the property in the oil had passed to the plaintiff, and that he could maintain an action of trover against the defendant (*Langton* v. *Higgins*).

Bet on hop duty.—A bet upon the hop duty is not a transaction tainted with illegality; and the indorsee of a promissory note given for such a bet is not called upon to prove consideration, the note being void for want of consideration merely as between the maker and the payee (*Fitch* v. *Jones*).

Acceptance of goods to satisfy Statute of Frauds may be prior to actual receipt.—The "acceptance" of goods required by the 17th section of the Statute of Frauds (29 Car., Q.C., 3), in order to make the contract of sale good, may be *prior* to the "actual receipt," and need not be contemporaneous with or subsequent to it. The defendant on October 24th having examined at Liverpool several of a lot of 156 firkins of butter, verbally agreed with the plaintiffs to purchase the whole of them and directed them to be sent by carriers, whom he named, to Fenning's Wharf, London. The butter was accordingly delivered by the plaintiffs to the carriers, and by them delivered at Fenning's Wharf in two lots on October 27th and 26th. Fenning was in the habit of receiving and warehousing butter for the defendant until he sold it. The plaintiffs sent an invoice to the defendant in London on October 25th, with a letter apprising him that the butter had been sent as he had directed. There was no direct evidence that the defendant inspected the butter on the wharf, but on October 27th he telegraphed to the plaintiffs that he should send it back as not being according to sample, and it was re-delivered on the same day by Fenning to the carriers, under an order from the defendant. No question was left to the jury, and a verdict taken for the amount claimed, and a rule was obtained on the ground "that there was no compliance with the Statute of Frauds."

It was held by the Court of Queen's Bench—First, that there was ample evidence that the goods when placed on the wharf were put under the control of the defendant, so as to put an end to any right of the plaintiffs as unpaid vendors; and that therefore there was a sufficient "actual receipt" by the defendant within the 17th section of the Statute of Frauds; and secondly, that the defendant having selected at Liverpool the specific firkins as those which he agreed to take as his property as the goods sold, and having directed those specific goods to be forwarded to London, there was an "acceptance" by him within the section. It was not contended that there was any sufficient memorandum in writing in the present case, but it was contended that there

was sufficient evidence that the defendant had "accepted the goods and actually received the same," and on consideration the Court were of that opinion. And per *Curiam:* "The words of the statute are express, that there must be an acceptance of the goods or part of them, as well as an actual receipt; and the authorities are very numerous to show that both these requisites must exist, or else the statute is not satisfied. In the recent case of *Nicholson* v. *Bower* (1 E. &. E. 172, 28 L.J. (N.S.), Q.B. 97), which was cited for the defendant, 141 quarters of wheat were sent by railway addressed to the vendee. They arrived at the end of their destination, and were there warehoused by the railway company under circumstances that might have been held to put an end to the unpaid vendor's original lien. But the contract was not originally a sale of specific wheat, and the vendee had never agreed to take those particular quarters of wheat; on the contrary, it was shown to be usual, before accepting wheat thus warehoused, to compare a sample of the wheat with the sample by which it was sold; and it appeared that the vendees knowing that they were in embarrassed circumstances purposely abstained from accepting the goods, and each of the judges mentions that fact as the ground of his decision."

"In *Meredeth* v. *Megh* (2 E. & B. 370, 22 L.J. (N.S.), Q.B. 401), the goods which were not specified in the original contract had been selected by the vendor, and put on board ship by the direction of the vendee, so that they were in the hands of a carrier to convey them from the vendor to the vendee. It was there held, in conformity with *Hanson* v. *Armitage* (5 B. & Ald. 557), that the carrier though named by the vendee had no authority to accept the goods. And in this we quite agree, for though the selection of the goods by the vendor, and putting them *in transitu*, would but for the statute have been a sufficient delivery to vest the property in the vendee, it could not be said that the selection by the vendor or the receipt by the carrier was an acceptance of those particular goods by the vendee. In *Baldy* v. *Parker* (2 B. & C. 37), which was much relied on for the defendant, the ground of the decision was that pointed out by *Holroyd* J., who says: "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute. The principle here laid down is, that there cannot be an actual receipt by the vendee so long as the goods continue in the possession of the seller, as unpaid vendor, so as to preserve his lien, and it has been repeatedly recognised. But though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and vendee that the possession shall thenceforth be kept not as vendor, but as bailee for the purchaser, the right of lien is gone; and then there is a sufficient receipt to satisfy the statute. *Marvin* v. *Wallis* (8 E. & B. 726, 25 L.J. (N.S.), Q.B. 369); *Beaumont* v. *Brengeri* (6 C.B. 301). In both these cases, the specific chattel sold was ascertained, and there appear to be acts indicating acceptance subsequent to the agreement, which changed the nature of the possession.

In the present case, there was ample evidence that the goods when placed in Fenning's wharf were put under the control of the defendant, to await his further directions so as to put an end to any right of the plaintiffs as unpaid vendors, as much as the change in the nature of the possession did in the cases cited.

"There was also sufficient evidence that the defendant had at Liverpool selected these specific 150 firkins of butter, as those which he then agreed to take as his property as the goods sold, and that he directed those specific firkins to be sent to London. This was certainly evidence of an acceptance, and the only remaining question is, whether it is necessary that the acceptance should follow or be contemporaneous with the receipt, or whether an acceptance before the receipt is not sufficient. In *Saunders* v. *Topp* (4 Ex. 390, 18 L.J. (N.S.), Ex. 374), which is the case in which the facts approach nearest to the present case, the defendant had, according to the finding of the jury, agreed to buy from the plaintiff 45 couple of sheep, which the defendant the purchaser had himself selected; and the plaintiff had by his directions put them in the defendant's field. Had the case stopped there, it would have been identical with the present. But there was, in addition, some evidence that the defendant, after seeing them in the field, counted them and said it was "all right," and as this was some evidence of an acceptance after the receipt, it became necessary to decide whether the acceptance under the statute must follow the delivery. *Parke* B., from the report of his observations during the argument, seems to have attached much importance to the selection of particular sheep by the defendant; but in his judgment he abstains from deciding on that ground, though certainly not expressing any opinion that the acceptance must be subsequent to the delivery. The other three Barons, *Alderson*, *Rolfe*, and *Platt*, express an inclination of opinion, that it is necessary under the statute that the acceptance should be subsequent to or contemporaneous with the receipt; but they expressly abstain from deciding on that ground. In the elaborate judgment of Lord *Campbell* C.J., in *Morton* v. *Tibbett* (15 Q.B., 428 and 434, and 19 L.J. (N.S.), Q.B. 382), the nature of an acceptance and actual receipt sufficient to satisfy the statute is fully expounded. He says: "The acceptance is to be something which is to precede or at any rate to be contemporaneous with the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined." The intention of the Legislature seems to have been that the contract should not be good unless partially executed; and it is partially executed, if, after the vendee has finally agreed on the specific articles which he is to take under the contract, the vendor, by the vendee's directions, parts with the possession and puts them under the control of the vendee, so as to put a complete end to all the rights of the unpaid vendor as such. We think therefore that there is nothing in the nature of the enactment to imply an intention, which the Legislature had certainly not in terms expressed, that an acceptance prior to the receipt will not suffice. There is no decision putting this construction on the statute; and we do not think we ought so to con-

strue it. We are therefore of opinion that there was evidence in this case to satisfy the statute, and that the rule must be discharged" (*Cusack* v. *Robinson*).

Contract for turnip seed to satisfy Statute of Frauds.—The plaintiff, a seed merchant in Kent, wrote to the defendants, seedsmen in London, offering to sell the seed of growing turnips, to which the defendants replied, asking the quantities and price for white globe turnip seed. The plaintiff answered that all he could offer at present was the produce of five acres at 18s. 6d. per bushel delivered at the Bricklayers Arms Station. The defendants offered to take two or three acres at 16s. 6d. The plaintiff wrote saying he could not accept less than 18s., his contract price with London houses. The defendants then wrote the following letter, dated March 21st: "In reply to your favour of this morning, we beg to say, as our neighbours are giving you 18s. per bushel for white globe turnip, we as a beginning with you will take the produce of three acres at that price, to be delivered, as soon as harvested, free of carriage to London station. Let us know what other sorts you may have to offer, as also wurzel seed of sorts for 1861 harvest. Waiting your reply, we remain, &c." The plaintiff verbally told the defendants he accepted the offer. The defendants having refused to receive the seed, it was held by the Court of Exchequer, confirming *Wightman* J.'s ruling on the trial, that there was a binding contract in writing within the 17th section of the Statute of Frauds, although the plaintiff never replied in writing to the defendant's last letter. The plaintiff gave evidence to the effect that he did not reply by letter to the defendant's letter of March 21st, but that being in London on March 25th he called at the defendant's shop, and had some conversation with Ainsworth one of the defendants, on the subject of other seeds, in the course of which the defendant said: "I think we have some transaction with you?" and the plaintiff replied, "Yes, a contract for three acres of white globe. The defendant, Ainsworth, on the other hand, stated that he said to the plaintiff when he called, "I believe we have been writing to you about some turnip seed?" and the plaintiff said, "Yes, but I cannot accept your offer;" and that acting upon that the defendants bought turnip seed elsewhere at a higher price. It appeared that the market had fallen considerably between March and August. *Wightman* J. left it to the jury to say whether the plaintiff at the interview rejected or accepted the terms of the letter of March 21st, reserving leave to the defendants to move on the question of whether there was any contract in writing to satisfy the 17th section of the Statute of Frauds. The jury found that the contract was accepted and the verdict was entered for the plaintiff. And per *Wilde* B.: "The single question is whether the letter of 21st of March is a sufficient memorandum within the Statute of Frauds? If it is a contract to buy three acres of turnip seed at 18s. per bushel, then the point is not arguable. I think it is a contract. I will only say in reference to the words 'waiting your reply,' that if they are to be regarded as making only a proposal, then there is not a contract, but I do not give that effect to the words. The letter makes enquiries as to other sorts of turnip seeds, and also as to wurzel seed, and

the defendants wait for a reply as to that part of the letter" (*Watts* v. *Ainsworth*).

Wrongful act of one party to a contract must amount to rescision to enable the other to repudiate it.—To a declaration on a contract for the sale of growing trees, alleging for breach that although the defendant had permitted the plaintiff to fell and carry away certain trees, he refused to permit him to fell and carry away the residue; defendant pleaded that after the promise and before breach, the plaintiff fraudulently felled and carried away trees, which were not sold to him, exceeding in number and value the said residue, which trees so fraudulently felled and carried away were taken by the plaintiff in fraudulent substitution of the trees purchased by him, as in the declaration mentioned; that the plaintiff kept the trees so fraudulently felled and carried away by him; and that therefore the defendant refused to permit him to fell and carry away the residue of trees contracted for. It was held by the Court of Common Pleas that the plea was bad, inasmuch as it showed *not a rescision or abandonment of the contract by the plaintiff, but a mere act of trespass or wrongful act*, for which the defendant might have a remedy; and that there was no estoppel. And per *Jervis* C.J.: "*There is no allegation in the plea that there has been any mutual rescision of the contract.* Nor is there any estoppel in *pais* or by standing by, a doctrine, by-the-bye, which seems to me to have been carried to a dreadful extent." And per *Maule* J.: "Every wrong has its remedy, but the remedy must be appropriately pursued; *the wrongful act of one party to a contract does not necessarily enable the other to repudiate the contract on his part unless it amounts to a rescision of it*" (*Lewis* v. *Clifton*).

No contract where sale conditional on answer by return of post which was not sent.—A letter making an offer for a horse, adding, "Send a reply by return of post," was held by *Byles* J. to be conditional, and not to constitute a contract in the absence of a reply; and the subject of the letter having been sent to, but not actually received by the defendant, it was also held there was no delivery to him. The offer having received no answer, and being conditional on return of post, the plaintiff could not recover on goods bargained and sold, and there not having been a delivery proved, the plaintiff could not recover on goods sold and delivered, and the verdict for the defendant was confirmed by the Queen's Bench (*Kirby* v. *Trotter*). And in *Emmott* v. *Riddell*, a proposal on one side, not answered by the other until after a delay of some months, and then not assented to, but some months afterwards acceded to, was held by *Martin* B. to be no evidence of a contract.

Letter of repudiation of goods as damaged sufficient contract within Statute of Frauds.—The purchaser of goods wrote a letter to the seller, in which after referring to all the essential terms of the contract, he stated that he had never received and had declined to have the goods, because they had been damaged by the carrier before they reached him. It was held by the Court of Common Pleas, that such letter, notwithstanding it contained such repudiation, was a sufficient memorandum of the contract to satisfy the 17th section of the Statute of Frauds; and per *Willes* J.: "Assuming there to be a valid con-

tract, the defendant would be bound to pay for these goods, and not having done so there would be a good cause of action. Now at common law it is clear that there would exist in this case a good cause of action; but it is said that the defendant is not liable by reason of the Statute of Frauds. I think, however, that the defendant is liable, and I found my opinion on the 17th section of that statute. It appears that there is no authority on the subject in favour of either party with the exception of the dictum of my brother *Blackburn*, and that must be taken in connexion with the statute itself. Now, it is necessary to look at the words of the statute: they are, that the contract shall not be good unless, amongst other things, 'some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract.' It follows, therefore, from these words, that if there be any note or memorandum in writing of the bargain signed by the party to be charged, the contract is to be allowed, as at common law. Then is there in the present case a memorandum in writing containing the terms of the bargain? I think that on the true construction of the defendant's letter of December 3rd, there is such a memorandum, within the meaning of the statute. It has been argued that there is not, because the statement in the letter is accompanied by a repudiation of the bargain; but I think that to hold that such letter is not, on that account, a note or memorandum of the bargain would be to disregard the word "some" in the statute. There is here a note in writing of the bargain, and the statute does not say that where there is such, the statute is not to be satisfied if there exist also other circumstances (*Bailey* v. *Sweeting*).

Conversation admissible to explain meaning of "your wool," in a contract.—Plaintiff called on defendant's agent, and told him he had a quantity of wool, part of his own clip, and part what he had contracted to buy of other farmers, and that the whole quantity amounted to "2,300 stones, 100 stones more or less." Plaintiff afterwards wrote to the same agent, saying he had succeeded in getting the promise of another clip, which would stand about 550 stones, and that it would go along with his other wool. In the following month defendant's agent wrote to plaintiff saying, defendant desires me to offer you for "*your wool*" 16s. a stone. Plaintiff wrote back, "I agree to your offer for the wool" for 16s. a stone. Plaintiff afterwards tendered 2,700 stones of wool, which defendant refused to accept. It was held by the Exchequer Chamber, approving the judgment of the Queen's Bench, that the written offer and acceptance formed a good contract in writing to purchase certain wool plaintiff described as "your wool," that evidence of the previous conversation and letters was admissible to explain the expression "your wool" in the contract, and to point out that the subject matter, to which the contract applied, was the wool which plaintiff had under his control at the time of the contract, and was not limited to the quantity first mentioned 2,300 stones, 100 stones more or less, and consequently that plaintiff was entitled to recover. And per *Byles* J.: "The expression 'your wool' is the language of the defendant. The evidence shows that the term may be read in two senses; as against him the largest and most disadvantageous

sense should be taken. The parol evidence shows that this is a case of latent ambiguity. This moreover is evidence not to vary, but to apply the contract. It is admissible so far as it might apply to the contract; inadmissible so far as it might tend to vary the contract if it did so tend. The mention of the quantity seems to me to have no effect on the question" (*Macdonald and Another* v. *Longbottom*).

Vendor liable for false representation of length of lease even when vendee had means of knowledge.—The mere possession by a purchaser of the *means* of knowledge, does not prevent the vendor's liability for a false representation; and the vendor having sold a lease as of a longer term, he knowing it to be a shorter, was held liable though he had sent a draft conveyance reciting the lease, the recital not having been referred to by the purchaser, and the plaintiff's verdict was upheld by the Queen's Bench (*Ferrier* v. *Peacock*).

Assignment by bill of sale to attorney from client not void on ground of champerty.—*Anderson* v. *Radcliffe and Walker* was affirmed in error, and per *Curiam*: "The Court of Queen's Bench which decided *Simpson* v. *Lamb* (7 E. & B. 84, 26 L.J. (N.S.), Q.B., 121), distinguished this case from that, on the ground that here there was not an absolute purchase, but only a security for costs already due.

Seizure and sale under a bill of sale.—On a bill of sale with covenant for payment of the money at a distant day "or at such other day or time" as the creditor, the assignee, might appoint by notice in writing, it was held by the Court of Queen's Bench that reasonable notice was required, and the assignee having made a demand of payment in half-an-hour, and in default of payment seized and sold, he was liable to an action of trespass, but that the damage must be estimated with reference to the probability of the debtor's having been able to obtain the money had reasonable notice been given; and *semble* per *Crompton* J., that a reasonable notice means not merely such time as might be necessary for him to get the money, supposing him to have had it ready, but time to raise it, supposing that he had it not (*Brightley* v. *Norton*).

Portion of bankrupt's farm produce sold and placed separate does not pass to assignees.—Where, according to the custom of some parts of England, the sold produce of a farm is stacked apart from the unsold produce thereof, with liberty for the purchaser to remove such sold produce from time to time as he may require it, and at the date of the bankruptcy of the seller a portion only of such sold produce has been removed, it was held that the purchaser was entitled to the benefit of the unremoved portion, and that the same did not pass to the assignees of the seller as being in his order, and disposition within the meaning of the 125th section of the Bankrupt Law Consolidation Act, 1849 (*Ex parte Vidler and Another re Terry*).

Railway dividing one part of farm from another.—A railway passed through a farm, and divided it, so that the buildings could not be conveniently used for one part of the farm. This was held by *Romilly* M.R., to be an injury within the meaning of 8 and 9 Vict., c. 18, s. 69, which required the substitution of other buildings, and that the compensation paid for the damage might be applied in the erection of

new buildings upon that part of the farm which required them. It was also held on the authority of *In re Buckingham Railway Company* (14 Jur. 1065), that the application for the sanction of the Court was not within 8 and 9 Vict., c. 18, s. 80, and that the railway company was not liable to pay the costs, but that the costs, exclusive of those of the railway company, must be paid out of the fund in Court (*In re Oxford, Worcester, and Wolverhampton Railway Company ex parte the Devisees of Milward*).

When railway company obliged to take house and premises.—A railway company under the compulsory powers of the Land Clauses Consolidation Act cannot take a portion of a garden and orchard essential to the enjoyment of a mansion and premises; they must take the entire house and curtilage; and therefore where a mansion and premises were surrounded by a brick wall, and a railway company took a portion of the garden and orchard, and divided one part of the premises from another, and destroyed all the internal communication, it was held that the company were bound to take the whole estate. And a company may abandon a notice given with the intention of taking lands under the compulsory powers conferred upon them: such notice without some act to obtain possession is not a contract binding on the company; per *Romilly* M.R. (*Reg.* v. *Wycombe Railway Company*).

Requiring company to take all the premises they cut through.—A landowner having received notice from a railway company to treat for the sale of a part of his premises, does not by offering to sell that part at a price named by him preclude himself, if the company decline the offer, from requiring them to take the whole under the 92nd section of the Lands Clauses Consolidation Act; per *Wood* V.C. (*Gardner* v. *Charing Cross Railway Company*).

Mortgage on living sold no ground for rescinding contract.—An advowson was sold, and after the sale, the purchaser found that there was a mortgage on the living for money advanced to build a new parsonage house. It was held by the House of Lords on appeal from *Stuart* V.C. and the Lord Justices that this *did not form a ground for rescinding the sale of the advowson, or for allowing to the purchaser a deduction from the amount of the purchase money.* And per Lord *Campbell*: "No misrepresentation on the part of the vendor was alleged; but it was said he did not communicate the fact of this charge on the living; that could not affect the sale of the advowson, the value of which it did not diminish but rather increased, for the living was more valuable for having a good parsonage-house on the land, than if the house was bad or there was none. The case of *Burnell* v. *Brown* (1 J. and W., 68) did not apply; for there the right of sporting over the land did affect the value of the land, which was the thing sold. This was a case where the maxim *Caveat emptor* applied; and the purchaser not having made himself acquainted with all the facts, which he might easily have done, had no title now to ask for compensation." And per *Cranworth* Lord: "Before the law was altered as to titles, I question much whether, if the vendor of an advowson knew that there was a modus affecting a particular farm, he was bound to say a word about it" (*Edwards Wood* v. *Marjoribanks and Others*).

Inaccurate particulars at sale.—If particulars *inaccurately describe premises* to be sold by auction, the Court will refuse to direct a specific performance of the contract, though the error might have been ascertained on a minute inspection of the particulars and conditions of sale; and the evidence of an auctioneer is admissible to state what took place at the auction. In the disputed lot (which was described as "an undivided moiety in freehold plantation, &c."), the particulars said, "the apportioned rent of this lot is £16 per annum," whereas it was only £8, but the error was patent on such particulars. And per *Sir J. Romilly* M.R.: "I regret I cannot make a decree for specific performance, because the defendant has occasioned this suit by refusing the offer made to put an end to the contract. In case of mistake, the principle upon which the Court proceeds is, that if it appears upon the evidence that there was in the description of the property a mistake, which a person might *bonâ fide* make, and he swears positively that he did make such mistake, the evidence not being contradicted, this Court cannot enforce the specific performance of the contract against him. If there is no ground for the mistake, if no man with his senses about him could have misapprehended the description or character of the parcels, then it is not sufficient for him to say that he made a mistake or he did not understand what he was about. It is quite different from *Malins* v. *Freeman* (2 Keen 25, s. c. 6, L.J. (N.S.), Ch. 133), where a man bought one lot by mistake for another, and as soon as the auction was over, stated that he had made the error and refused to sign the contract. Still the statement here is contained in the lot, and grammatically it applies to the apportioned rent of the lot, and the lot is an undivided moiety, and I cannot say upon that statement that it is not possible a person may have been *bonâ fide* deceived in the matter, and he swears he was so deceived" (*Swaisland* v. *Dearsley*).

Reopening Chancery biddings.—A person who was present at a sale by public auction, by direction of the Court, having within the eight days of the sale offered an advance of £200 on £2,600, he was allowed by *Stuart* V.C., to open the biddings on payment of the costs of the highest bidder (*In re Jones's Settled Estates*).

Right of agent to remuneration where sale goes off.—In the absence of any express contract, auctioneers are entitled to reasonable remuneration for sales by private contract, effected through their instrumentality, even although by the act or default of the *vendor* the contract is rescinded; and it is for the jury whether the same commission as on sales by auction is reasonable; and *semble* that apart from express contract, they would be entitled to the expenses of abortive attempts at sale, but it would not be reasonable that the auctioneer should charge not only expenses and a fixed fee, but also commission: per *Cockburn* C.J. (*Clark* v. *Smythies*).

Agent should declare himself at an auction.—A party bidding at an auction, and giving his own name simply to the auctioneer, must be understood to be the contracting party, and ought to be held liable as such; if he is bidding only as agent, and wishes to protect himself from being treated as the contracting party, he ought to say so (*Williamson* v. *Barton*).

Chapter XV.

HORSES AND CATTLE.

Plea of Not guilty to false warranty.—In an action for the sale of a horse by a false warranty, *Not guilty* would seem to deny the warranty, the unsoundness, and the sale; but it has been held that where the sale was stated by way of inducement, it is not put in issue by that plea (*Spencer* v. *Dawson* and *Marsh* v. *Denham*).

Warranty of horse being "a clever hack" does not imply that it is sound.—*Cleobury* v. *Tattersall* was brought to recover from the defendants, the well-known proprietors of the horse establishment at Hyde Park Corner, the sum of £43, upon an alleged warranty of a horse, purchased by the plaintiff at one of their public sales. It appeared that the plaintiff, a solicitor, was on the 11th May looking over the list of horses entered for sale the following day at Tattersall's. He saw a horse, described in the catalogue as "a bay gelding, a clever hack and hunter," and on the following day he went to the sale, purchased the animal for 21 guineas, and rode it home to his residence at Bayswater, when it "blundered" and stumbled twice during the journey; and on the day after he sent it to Mr. Field, the veterinary surgeon, who examined it, and gave a certificate that it was lame in both its fore-legs. It was then returned to Messrs. Tattersall's, who refused to receive it, on the ground that no warranty of soundness had been given, and that the horse really was what it was described to to be—"a clever hack and good hunter." Witnesses were called to prove that the horse was in an unsound state. *Blackburn* J. said that as a point of law he must certainly rule that the description of the horse as "a clever hack" did not amount to a warranty of soundness; the only question for the jury was whether, upon all the facts, they considered the horse entitled to be described as "a clever hack." The jury considered that, from the description, the plaintiff had a right to expect something different, and they returned a verdict in his favour. A verdict was then taken for the plaintiff, but judgment was stayed, the learned judge giving the defendants leave to move to enter a nonsuit, in the event of the Court being of opinion that he was wrong in law in his ruling with regard to the contract. The defendants did not carry the point into a higher court; and we understand from them that the horse has gone well both as hack and hunter since.

Unauthorised warranty by servant.—In *Brady* v. *Tod* (30 L.J. (N.S.), 223 C.P.), it was decided that the servant of a private owner entrusted on one particular occasion, not at a fair or other public mart, to sell

and deliver a horse, is not therefore by law authorised to bind his master by a warranty; but the buyer who takes a warranty in such a case takes it at the risk of being able to prove that the servant had his master's authority to give it. The defendant was not a horse-dealer, but a tradesman residing in London, who also had a farm in Essex which was managed by his bailiff Greig; and the latter, by the defendant's authority, sold the horse in question to the plaintiff, and, as the jury found, with a warranty that it was sound and quiet in harness; but it was also proved that the defendant gave no authority to Greig to give any warranty. The horse having turned out vicious in harness, the plaintiff brought this action and recovered, leave being reserved to the defendant to enter a non-suit. And per *Erle* C.J.: "Upon this rule to set aside the verdict for the plaintiff, and enter it for the defendant, on the plea denying the warranty of a horse, the question has been, whether the warranty by the defendant was proved. The jury have found that Greig in selling the horse for the defendant warranted it to be sound and quiet in harness. The defendant stated, and it must on this motion be taken to be true, that he did not give authority to Greig to give any warranty.

"The relevant facts are, that the plaintiff applied to the defendant, who is not a dealer in horses, but a tradesman with a farm, to sell the horse; that the defendant sent his farm-bailiff Greig with the horse to the plaintiff, and authorised him to sell it for 30 gs. The plaintiff contends that an authority to sell and deliver imports an authority to him to warrant. The subject has been frequently mentioned by judges and text writers, but we cannot find that the point has been ever decided. It is therefore necessary to consider it on principle. The general rule that the act of an agent does not bind his principal, unless it was within the authority given to him, is clear; but the plaintiff contended that the circumstances created an authority in the agent to warrant on various grounds; among others, he referred to cases where the agent has by law a general authority to bind his principal, though as between themselves there was no authority, such as partners, master of ships, and managers of trading business; and stress was laid on the expressions of several judges, that the servant of a horse-dealer or a livery-stable keeper can bind his master by a warranty, though as between themselves there was an order not to warrant. See *Holyear* v. *Hawke* (5 Esp. 72), *Alexander* v. *Gibson* (2 Camp. 555), and *Fenn* v. *Harrison* (3 T.R., 759). We understand those judges to refer to a general agent employed for a principal to carry on his business, that is the business of horse dealing, in which case there would be by law the authority here contended for.

"But the facts of the present case do not bring the defendant within this rule, as he was not shown to carry on any trade of dealing in horses. It was also contended that a special agent without any express authority in fact might have an authority by law to bind his principal; as where a principal holds out that the agent has such authority, and induces a party to deal with him on the faith that it is so. In such a case, the principal is concluded from denying this authority as against the party, who believed what was held out and acted on it (*Pickering*

v. *Busk*, 15 East 38). But the facts do not bring the defendant within this rule. The main reliance was placed on the argument that an authority to sell is by implication an authority to do all that in the usual course of a sale is required to be answered, and that therefore the defendant by implication gave to Greig an authority to answer that question, and to bind him by his answer. It was a part of this argument, that an agent authorised to sell and deliver a horse is held out to the buyer as having authority to warrant. But on this point also the plaintiff has in our judgment failed.

"We are aware that the question of warranty frequently arises upon the sale of horses, but we are also aware that sales may be made without any warranty or even enquiry about warranty. If we laid down for the first time that the servant of a private owner entrusted to sell and deliver a horse on one particular occasion is therefore by law authorised to bind his master by a warranty, we should establish a precedent of dangerous consequence. For the liability created by a warranty extending to unknown as well as known defects is greater than is expected by persons inexperienced in law; and as everything said by the seller in the bargaining may be evidence of warranty to the effect of what he said, an unguarded conversation with an illiterate man sent to deliver a horse may be found to have created a liability, which would be a surprise equally to the servant and the master. We therefore hold that a buyer taking a warranty from such an agent as was employed in this case, takes it at the risk of being able to prove that he had the principal's authority, and if there was no authority in fact, the law from the circumstances does not in our opinion create it.

"When the facts raise the question, it will be time enough to decide the liablity created by such a servant as a foreman alleged to be a general agent, or such a special agent as a person entrusted with the sale of a horse in a fair or other public mart where stranger meets stranger, and the usual course of business is for the person in possession of the horse and appearing to be the owner to have all the powers of an owner, in respect of the sale; the authority may, under such circumstances as are last referred to, be implied, though the circumstances of the present case do not create the same inference. It is unnecessary to add, that if the seller should repudiate the warranty made by his agen, it follows that the sale would be void, there being no question raied upon this point."

Limitation of particular of horses sold.—Under a particular specifying horses sold by the plaintiff to the defendant, the plaintiff cannot recover the pice of horses sold by the defendant for the plaintiff as his agent (*Holland* v. *Hopkins*).

Receipt of douceur by agent from seller.—*Wilson* v. *Stevens* was an action against Mr. Stevens, a veterinary surgeon, for having kept for an unreasonable time a horse which he had been employed by the plaintiff to sell, and for having, when employed by the plaintiff to examine and purchase a horse for him, bought an unsound horse, and received a bribe of £5 from the seller for the same. The plaintiff, Mr. Wilson, was recommended to the defendant as a man in whom he might safely confide to purchase horses for him, and it was agreed that

Mr. Stevens should charge £2 2s. for each of such purchases. Several dealings took place, some satisfactory, some otherwise, before the purchases of the horses which were the subject of this action. The charge was two-fold, and related to two horses. A horse was bought of Mr. Rice, for the plaintiff, for £105. After some time, not being quite pleased with it, Mr. Wilson sent it to the defendant for sale. It was kept by Mr. Stevens for 113 nights without being sold, Mr. Wilson being absent almost the whole of that time in Scotland. On his return, finding it still in the stables, he took it away, and sent it to Lawrence's stables, by whom it was sold in a very few days, for £60. Mr. Stevens brought an action against Mr. Wilson for the keep and care of this horse, which Mr. Wilson resisted. It was tried at Guildhall, when it appeared that no legal defence could be offered, and a verdict was given for the plaintiff.

In the course of this trial, it came out that Mr. Stevens had received £10 from Mr. Rice for selling this horse to the plaintiff; and thereupon Mr. Baron *Martin* told the jury that an agent had no right to take a single farthing from the party with whom he was dealing; that it was a disgraceful and dangerous transaction; and, although they could not reach it in that action, Mr. Wilson had another remedy; and he directed them to deduct the £10 so received from the amount claimed by the plaintiff. Upon this Mr. Wilson made further inquiries, and hence the present action. Mr. Stevens had previously bought for him another horse from a dealer named Sewell. At the time of the purchase, when trying it, Mr. Wilson was not quite satisfied with the horse's movements, and especially with the contracted shape of the feet, but Mr. Stevens said it was nothing, that the horse was sound and right; and, relying upon that advice, Mr. Wilson bought it for £90. It soon turned out to be a screw, and fell, and broke both its knees, and three veterinary surgeons certified that it was unsound, with contracted feet and diseased eyes of long standing. It was also sent to the defendant himself for examination; and, not remembering that it was the very one he had put upon Mr. Wilson, he also gave a certificate, which was read, that it was lame and unsound, with diseased eyes, and that these defects were of long standing. The horse was sent to Gower's and sold for £51, Sewell himself being the buyer.

An action was brought against Sewell on his warranty; and thereupon Sewell paid the whole difference between the sum he received for the horse, and that at which it had been sold, together with the costs. Mr. Wilson then discovered that, for putting the horse upon him, Mr. Stevens had received from Sewell the sum of £5. The present action was brought for the breach of duty by Stevens in that, having been employed and paid by Mr. Wilson to use his professional skill in the choice of a sound horse for him, he had either negligently or ignorantly bought an unsound one, and for having taken a bribe of £5 for so doing. Mr. Stevens had received £10 for one horse and £5 for another, as the same time charging Mr. Wilson as his professional adviser for buying these horses. Mr. Field's examination (he being ill) was read, where he stated that, from the condition of the horse when

he saw it, it must have been in a diseased state five months before, such as any man of ordinary professional skill ought to have detected, and Mr. Mavor and another gentleman gave evidence to the same effect.

For the defence, it was contended that, as to the first charge, there was proof that every possible endeavour was made to sell the horse; and, as to the second, that it was not proved that the unsoundness had actually existed at the time of the purchase, or could have been then discovered, and also that it was not proved that the horse seen by the veterinary surgeons was actually Sewell's horse, and that the £5 was not a bribe paid at the time, but a present made to Mr. Stevens afterwards for his trouble. Witnesses were then called to prove this, and among them the defendant himself, who admitted the receipt of the £10 from Rice and the £5 from Sewell, but added that he had returned the latter after the action had been settled by Sewell; and he also said that he did not believe the horse for which he gave the certificate was the same horse he had bought for Mr. Wilson. Mr. Baron *Martin* told the jury that upon the first charge they would exercise their own judgment whether there was any proof that defendant had not made reasonable endeavours to sell the horse. If they thought he had, he would be entitled to their verdict on the first count. But the other, on which the plaintiff mainly relied, was a much more serious matter, and he would tell them at once that an *agent, employed and paid to act for a purchaser of anything, has no right whatever to receive a single farthing from the seller.* It was a transaction perfectly unjustifiable, and which the plaintiff had acted most properly in bringing under the consideration of a jury. He then went through the evidence, and left it to them to say if they had any doubt that the horse seen by the veterinary surgeons was the same horse, remembering that Sewell had actually admitted it to be so by paying the loss upon it; and that if so satisfied they would give the plaintiff a verdict upon the second count, with such damages as they thought proper; and the damages to which he would be entitled would be the inconvenience and cost he had reasonably been put to, and which he had not recovered from Sewell, including the £2 2s. which the defendant had received for the services he had failed to render. The jury returned a verdict for the defendant on the first count, and for the plaintiff on the second count, damages £5. His Lordship immediately certified for costs and for the special jury, and observed to the jury: Gentlemen, this was a very proper action to bring, and a very proper verdict. It is just what I would have given myself.

Loss of good bargain evidence of value.—Although no damages can be recovered for the loss of a good bargain, the bargain would be *evidence of the value of the horse supposing him to be sound* (*Clare* v. *Maynard*).

Definition of bone spavin.—"Bone spavin is a bony deposit on articulating surfaces of joint. The term 'spavin' really means the lameness and not the disease. In splint especially, and in spavin, traces may disappear and disease exist."

Responsibility of hirer of horse.—As between the lender and hirer

of horses, the hirer, in the absence of any custom in the trade, is only bound to use reasonable care, to employ a competent coachman: per *Wilde* B. (*Abron* v. *Fussell*).

Lien of innkeeper on race-horse.—Where the owner of a race-horse went with it to an inn under circumstances sufficient to constitute him a guest, and remained at the inn with the horse for several months, it was held that he would be presumed, in the absence of evidence to the contrary, to continue to be there as a guest, so as to give the innkeeper a lien on the horse for his keep, although during such days the owner constantly took the horse out for training, and was sometimes absent with it for several days at races, at which the horse ran. A claim by the innkeeper to detain a horse for its keep during the whole time he has had it in his stable, when he is only entitled to a lien thereon for a portion of that time, does not dispense with the necessity of a tender of the amount for which there is a lien. And per *Erle* C.J.: "It would be unjust if a traveller could, after being at an inn for a number of days, change his character, and so defeat the innkeeper of his lien. It seems to me that the horses were taken out by Burrowes and his man from time to time in the ordinary way, and with the intention to return them to the inn, and such intention to return I take it is always strongly evidenced when a party goes out from an inn without asking for his bill" (*Allen* v. *Smith*). This decision was affirmed in the Exchequer Chamber.

Negligence of veterinary surgeon.—*Wilden* v. *Stanley* (*Veterinarian*, June, 1860), the plaintiff recovered 12 gs. for keep of a horse against the defendant, who was a veterinary surgeon. The evidence was that the horse was sent to defendant's forge to be examined for soundness. The defendant mounted him and had his shoes taken off to measure the feet. When they had been replaced, he went into his office to write the certificate, and on returning the horse lifted one of its fore-legs, as if in great pain, and it transpired that a stub-nail which had been amongst a lot of parings on the floor had got into his hoof. The horse became too lame to walk, and it was arranged that it should remain under the defendant's care, and it did so from February to April. At his suggestion, it was then sent to grass, came back to the forge in June, and went to the plaintiff in July. Since then it had slightly improved, but was so useless, that Mr. Wilden had to buy a horse to do its work at £45, and could only re-sell at £32. Mr. Stanley's bill (£18 6s. 6d.), for keep and professional attendance, &c., was paid under protest, and now Mr. Wilden sought to recover that amount back less 10s. 6d. the fee for examining the horse, and the £13 loss on its sale. The defendant said that at the time of the accident he had promised to attend professionally upon the horse, without charge, but that the plaintiff was to pay for the keep. *Pollock* C.B., held that the real point in issue was whether a veterinary surgeon, who also kept a farrier's-shop, was bound to have the latter kept in such a condition as that a horse might be tied up in it with safety. If the floor was not properly swept, and substances left lying about which ought not to be there, and the horse in question sustained injury thereby, the veterinary surgeon was responsible, either for his own negligence, or that of his

servants. The jury gave the plaintiff a verdict for 12 gs., the amount charged for the keep of the horse.

Negligence in shoeing horse.—In *Commerell* v. *Stevens* (*The Veterinarian*, April, 1861), the plaintiff recovered 20 gs. for damage received by her horse, which dashed its eye against a hook six feet from the ground and three inches from the wall of the forge, which had been there without causing an accident for nearly forty years. The coachman had been requested to leave the horse, and it seems that it had hung back during shoeing; and one of the men had hit it with the flat side of a hammer, and the other with a twitch-stick, to make it go forward. A veterinary surgeon gave it as his opinion that the sight of the eye was wholly gone, and the horse was resold at Tattersall's for 40 gs., or £58 less than was given for it, and £11 7s. 6d. was paid for professional attendance. It recovered the sight, and was sold again for 47 gs., and again for £100. Mr. Stevens, the defendant, was called, and said that he had been in practice as a veterinary surgeon and farrier for 28 years, 20 of which he had passed at Newmarket, and that the fixtures, hooks, rings, &c., in Park-lane, were those used by his predecessor, Mr. Henderson, for very many years, and were quite fit for the purposes to which they were put. Professor Spooner was also called, and stated that he had examined the forge with the hooks, &c., and that it was a very fit and proper place for shoeing horses; but the jury, after *Martin* B. had summed up, gave 20 gs. damages.

Improper sheep-dipping composition.—In *Black* v. *Elliott*, a rule for a new trial was obtained, firstly, on the ground that there was not evidence on which the jury could reasonably find that the death of the plaintiff's sheep was caused by reason of the sheep-dipping composition sold by the defendant to the plaintiff not being reasonably fit and proper for the purpose of dipping sheep; and secondly, that the verdict found for the plaintiff on the third plea was against the weight of the evidence. The Court of Exchequer refused to grant a new trial.

Debt due by owner to agistor no defence in action of trover by owner against third party.—A farmer who had received sheep from an agistor was held liable, by *Wightman* J., in trover to the owner, on his claiming to detain them for a debt due to the agistor, and not allowed to deduct from the amount of the credit the sum due for feed, which had been tendered by the owner and refused (*Prentice* v. *Taylor*).

Title to horse against original owner.—A *bona fide* purchaser of a horse from a person who bought it (as the second purchaser knew) at a fair without any evidence that he knew it was obtained dishonestly, although it had been purchased on credit, and not paid for, was held by *Blackburn* J. entitled *to maintain trover against the original owner* for retaking it (*Northouse* v. *Jackson*).

Action against an auctioneer for selling a horse by mistake.—In *Felthouse* v. *Bindley* (31 L. J., N.S., C. P. 204), the plaintiff wrote to A, offering to purchase of him a horse at a certain price, and saying that, if he heard nothing further, he should assume that A accepted the

offer. He did hear nothing further, until after a sale by auction had taken place, when both A and the defendant, who was auctioneer at the sale, wrote to the plaintiff to say that the horse had been sold at the sale *by mistake*, and expressing their regret at the occurrence. It was held that in an action by the plaintiff (who recovered £33) against the auctioneer for the conversion of the horse, that, as there was no memorandum in writing binding on A in existence at the time of the sale, *the property in the horse had not vested in the plaintiff*, and that he could not rely on the subsequent letter of A, as that would not relate back so as to complete the plaintiff's title at the time in question. The declaration contained one count only, for the conversion of a horse of the plaintiff, to which the defendant pleaded Not Guilty, and that the horse was not the plaintiff's horse. Two letters had passed before the sale by mistake between the plaintiff and his nephew, who owned the horse, as to whether it was to be 30 gs. or £30; and the plaintiff wrote back saying he would give £30 15s., and pay the expenses from Tamworth; but to this offer no reply was received. The nephew wrote after the sale, acknowledging that the horse was to have been bought in without charge for the plaintiff, and saying that he had offered £5 to the buyer to induce him to give it up. And per *Willes* J.: "It is clear that the nephew *intended* to accept his uncle's offer, but he did not, as far as it appears on this part of the evidence, actually accept or do anything which would prevent him from altering his mind, and refusing to accept. Nothing, therefore, is done to vest the horse in the plaintiff up to Feb. 25th, that is, taking the evidence independently of the letters, which are said to contain an admission of a binding contract between the uncle and nephew. The more important letter is that of the nephew of Feb. 27 [after the sale by mistake], which shows undoubtedly that he had *then* accepted the offer. That letter, however, may be taken either as a then acceptance or as a memorandum of a bargain complete before Feb. 21st [the day of the sale] sufficient to satisfy the Statute of Frauds. I think it most likely that it was the former; but it would be directly contrary to the decision in *Stockdale* v. *Dunlop* (6 M. & W. 224, 9 L. J., N.S., Ex. 83) to hold that this acceptance related back to the previous offer, so as to make a contract available from the time when that offer was made. I am, therefore, of opinion that the plaintiff had no property in the horse at the time when the alleged conversion took place, and that this rule to enter a nonsuit must be made absolute." The judgment of the Common Pleas was affirmed in Error. And per *Curiam*: "There was here no contract, no warranty, no delivery, no part payment to satisfy the Statute of Frauds."

Bidding by owner on a sale "without reserve."—It was decided in error, in *Warlow* v. *Harrison*, that if an auctioneer inserts in the conditions of a sale by auction that the property is to be sold "without reserve," he by so doing contracts with the highest *bonâ fide* bidder that the sale shall be without reserve; *and the contract is broken if during the auction a bid is made by or on behalf of the owner of the property sold, and in such case* the auctioneer is liable to an action at the suit of the highest *bonâ fide* bidder. The auctioneer ought not on

such a sale to take a bid from the owner. The owner may at any time before the contract is complete revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of the employment and revocation, the auctioneer is entitled to be indemnified by the owner. And per *Willes* J. and *Bramwell* B: "If an auctioneer not having authority from the owner to sell property without reserve undertakes to sell it without reserve, he is liable on his undertaking. The Court did not reverse the judgment of the Queen's Bench, but thought it "right upon the pleadings as they now stand."

Martin B. observed, in allusion to *Thornett* v. *Haines* (15 M. & W. 367, and 15 L. J., N.S., Ex. 230): "According to all the cases both at law and in equity, neither the vendor nor any person on his behalf may bid at the auction, and the property shall be sold to the highest bidder, whether the sum bid be equal to the real value or not. We cannot distinguish the case of an auctioneer putting up property for sale on a 'without reserve' condition from that of a loser of property offering a reward, or a railway company publishing a time-table stating the times when and the places at which the trains run. It has been decided that a person giving information advertised for, or a passenger taking a ticket, may be sued or sue as upon a contract with him (*Denton* v. *Great Northern Railway Company*, 5 E. & B. 860, 25 L. J., N.S., Q. B. 129). On the same principle, it seems to us that the highest *bonâ fide* bidder at an auction may sue the auctioneer as on a contract that the sale shall be without reserve. We think that the auctioneer who puts up property for sale upon such a condition pledges himself that the sale shall be without reserve, or, in other words, contracts that it shall be so, and that this contract is made with the highest *bonâ fide* bidder; and in case of a breach of it, that he has a right of action against the auctioneer. The case is not at all affected by the 17th section of the Statute of Frands, which relates only to direct sales, and not to contracts relating to or connected with them; neither does it seem to us material whether the owner or a person upon his behalf bids with the knowledge or privity of the auctioneer." The plaintiff was held to be entitled to the judgment of the Court, on condition that he would amend the declaration, but it was agreed to enter a *stet processus*.

"Whole cause of action" in warranty within meaning of County Court Act. — In *Aris* v. *Orchard*, the defendant resided at B, and the plaintiff bargained with him by parol for the purchase of a horse for more than £10, but the bargain was not completed. On the next day, the defendant, within the jurisdiction of the County Court of T, completed the bargain, and agreed to warrant the horse, and then delivered it to the plaintiff. It was held by the Court of Exchequer that he was rightly sued in that court for the breach of warranty, and that the "whole cause of action" arose there within the meaning of 9 & 10 *Vict.* c. 95 s. 60: there was no contract until the second occasion.

Majority of stewards may decide horse-race.—The stewards of a horse-race are not in the position of arbitrators between the persons

who have horses in the race; and it is not necessary that they should meet together and make a joint decision as to which horse has won, Two may decide it in the absence of the third, and although he dissents (*Parr* v. *Winteringham*).

Steward not disqualified from deciding a disputed race on which he may have betted.—A dispute having arisen as to the result of a horse-race, the stewards (who by the rules of the course were to be the arbitrators of all disputes) decided against a horse against which one of them had made a bet. It was held that the decision of the stewards was not invalid on the ground of one of them being an interested arbitrator. The Court thought the stewards hardly arbitrators in the legal sense of the term; all they have to do is to give a fair, honest, and final decision (*Ellis* v. *Hopper*).

Judge's decision not final where regular starter did not come, and horse walked over.—Although the judge of a horse-race has power to decide finally who is entitled to the stakes as winner, such power does not accrue to him until the race has been run. Here the starter agreed upon did not appear, and the horse walked over (*Carr* v. *Martinson*).

APPENDIX (B).

VALE OF EVESHAM CODE OF LANDLORD AND TENANT-RIGHT.

The following terms of agreement are recommended by a special Committee of the Vale of Evesham Agricultural Society, appointed for the purpose of considering the best means of protecting the landlord against injury to his property through the impoverishment of his land by an outgoing tenant, and of affording the latter the compensation to which he is entitled for unexhausted improvements; these terms are framed upon the assumption that the tenant is subject to the customary restrictions as to the consumption of hay, straw, roots, and other food for cattle on the premises (except in special cases of agreement), and to other usual landlord, reservations.

The Committee recommend as follows:

1. That all farm tenancies commence at Michaelmas.

2. Not later than one month before the expiration of a tenancy, the landlord (or in-coming tenant, as the case may be) and the out-going tenant shall each appoint an arbitrator; these arbitrators shall meet not later than ten days before the expiration of such tenancy, and, having appointed an umpire, shall proceed to the consideration of the claims made by either party; in case either party refuse or neglect during the first twenty days of the month to appoint an arbitrator, the other may nominate an umpire, who shall have the same power as if he had been appointed by the arbitrators jointly; the terms "clean" and "in good condition," hereinafter used, shall be considered in a reasonable and practical sense, and the claims on either side contingent thereupon be treated accordingly.

3. The agreement of tenancy should contain no stipulation as to cropping; but if any dispute arise during the tenancy in respect of any course of cropping which the tenant may adopt, the same shall be forthwith submitted to the decision of arbitrators, or their umpire, appointed as in the second clause. Every award made in these arbitrations shall be final and binding upon both parties, and either party shall be at liberty to make such award a rule of any superior court of law.

4. At the expiration of the tenancy, one-half part of the arable land shall be clean and in good condition, and fit for planting with white straw

crops; of such half-part, one moiety shall have been fallowed (with green crops) during the previous summer; the other moiety thereof shall have been wholly under clover or mixed grass seeds, or part in clover and the rest beans or peas after being manured: none of the clover or other grasses shall have been allowed to stand for seed. One-fourth of the arable land shall have been sown, in the spring preceding the termination of the tenancy, with clover or other proper mixed grass seeds, upon land fallowed the previous year and clean (or upon clay-land farms this fourth may be not less than half clover, the remainder fit to plant with beans or peas). The cloverseeds shall be supplied by the landlord or in-coming tenant not later than the 1st of March; if not so supplied, they shall be purchased (not less than 14lbs. to the acre) by the out-going tenant, who shall be paid on production of vouchers for the same; he shall also be paid for sowing and harrowing, but shall not stock the seeds after harvest. Not more than one-fourth of the arable land shall require to be fallowed in the year after the termination of the tenancy, nor require an outlay of more than fifty shillings per acre to clean it; if it require less than that sum, the in-coming tenant shall pay the difference, if more than that sum the out-going tenant shall allow it.

5. The in-coming tenant shall pay after the rate of fifty shillings per acre for all land in excess of one-half which under the above conditions is fit to be planted with white straw crops, or shall be paid at the same rate for all short of one-half of the arable land so fit.

6. Not less than one-fourth of the clover or mixed grass seeds shall be mown for hay during the last year, for the use of, and to be paid for by, the in-coming tenant. For the remainder of the land, whereon clover or other grasses have been grazed the whole summer by sheep, the in-coming tenant shall pay after the rate of forty shillings per acre, provided such land be clean and that only one crop of corn has been taken since the previous fallow.

7. The out-going tenant shall be entitled to the sum of fifty shillings per acre for all clean fallows. If not clean, the cost of making them so must be deducted.

8. The out-going tenant shall be paid one-half the cost of all purchased manures applied to green crops in the last year of the tenancy, and one-fourth of that so applied in the last year but one, such cost not having exceeded forty shillings per acre. All unprepared bones and lime used upon any part of the farm within the last four years of the tenancy shall be paid for; also burnt soil, where the application has not been less than eighty cubic yards per acre, one-fourth of the cost in each case being deducted for each year's use; and for every other fertilizer of a permanent character such allowance as the arbitrators may determine. He shall also be paid one-half the cost of all oilcake and linseed consumed during the last year, and one-fourth of that consumed the last year but one, provided such oilcake and linseed have been given to cattle and sheep, but not to horses, and shall not in either case exceed the average of the three previous years.

9. In the last year of the tenancy the out-going tenant shall not take crops usually raised in market-gardens, and sold off the estate; and if in the preceding year he shall have taken such crop, he shall not receive an allowance for purchased manures used for the same, but shall be charged sixty shillings per acre for manure made on the farm and applied to such crops.

10. The out-going tenant shall be entitled to the value of all growing green crops, and of all hay and straw remaining on the premises; the

arbitrators shall fix the times for thrashing and for delivering such straw to the in-coming tenant.

11. It is desirable that all draining should be done by the landlord, he charging interest for the cost thereof; but where it has been done with pipes at the tenant's expense within the last ten years of the tenancy (provided the extent and system have been approved by the landlord in writing), the cost, not including the carriage of materials, shall be repaid, subject to a deduction of one-tenth for every year's use. In case the landlord has paid for materials only, the cost of labour shall be repaid to the tenant, subject to the deduction of one-fifth for every year's use.

12. All other permanent improvements made by the tenant, with the landlord's previous sanction in writing, shall be paid for as the arbitrators may determine.

EDWARD HOLLAND, Chairman.

AN ACT FOR THE PREVENTION OF POACHING.

[*7th August*, 1862.]

Whereas it is expedient that the laws now in force for the better detection and prevention of poaching should be amended: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The word "game" in this Act shall for all the purposes of this Act be deemed to include any one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game; and the words "justice" and "justices" in this Act shall, unless otherwise provided for, mean respectively a justice and justices of the peace respectively of or for the county, riding, division, liberty, city, borough, or place in which any game, gun, part of gun, net, snare, or engine after mentioned shall be found.

2. It shall be lawful for any constable or peace-officer in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace-officer shall, in such case apply to some justice

of the peace for a summons citing such person to appear before two justices of the peace assembled in petty sessions, as provided in the Eighteenth and Nineteenth of her present Majesty, Chapter One Hundred and Twenty-six, Section Nine, as far as regards England and Ireland, and before a sheriff or or any two justices of the peace in Scotland; and if such persons shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding five pounds, and shall forfeit such game, guns, parts of guns, nets, and engines, and the justices shall direct the same to be sold or destroyed, and the proceeds of such sale, with the amount of the penalty, to be paid to the treasurer of the county or borough where the conviction takes place; and no person who, by direction of a justice in writing, shall sell any game so seized shall be liable to any penalty for such sale; and if no conviction takes place, the game or any such article or thing as aforesaid, or the value thereof, shall be restored to the person from whom it had been seized.

3. Any penalty under this Act shall be recovered and enforced in England in the same manner as penalties under the Act First and Second William the Fourth, Chapter Thirty-two, and in Scotland under the Act Second and Third William the Fourth, Chapter Sixty-eight, and in Ireland under the Petty Sessions, Ireland, Act, 1851, when not otherwise directed in this Act.

4. The powers and provisions of the Act of the eleventh and twelfth years of her present Majesty, Chapter Forty-three, shall extend and apply to this Act, and to all proceedings, matters, and things to be taken, had and done, and to all persons to be proceeded against or taking proceedings under this Act.

5. No conviction or order made under this Act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari or otherwise into any of her Majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

6. Any person who shall think himself aggrieved by any such summary conviction may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of such conviction for the county, riding, division, or borough wherein the cause of complaint shall have arisen, provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall, within three days, enter into a recognizance or bond of caution in Scotland, with a sufficient surety, before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be awarded by the court; and the court at such sessions shall hear and determine the matter of appeal, and shall make such order therein, with or without costs, to either party, as to the court shall seem fit, and shall, if necessary, issue process for enforcing such judgment.

MARKET HARBOROUGH STEEPLECHASE RULES.

1. The rules concerning horse-racing in general, as published in the Racing Calendar (Races Past, 1862), apply to all steeplechases, with the exception of Rule 43, and of some other rules that are only applicable to flat racing, and also with the following exceptions and additions:

2. The decision of the Stewards, or whomsoever they may appoint, is final in everything connected with the *Steeplechases*, and there is no appeal whatever to a Court of Law.

3. A walk over shall in no case be deemed necessary, either after a dead-heat or otherwise. It shall be sufficient if a horse be weighed for, mounted, and proceed to the starting post, when, if no competitor appear in due time, he shall be considered the winner of the race. Such horse shall be liable to carry extra weight as a winner.

4. The term "winning horse," in reference to those liable to carry extra weight, or those to be excluded from any race, shall apply only to winners of steeplechases of £20 or upwards, not including the winner's stake, or of some prize of equal value, and not to the winner of hurdle races, flat races, or matches of any kind.

5. A maiden horse or mare is considered one that has never won a "steeplechase" of the value of £20 or upwards, not including the winner's stake; and a horse that has never started is one that has never started for a "steeplechase" of the value of £20 or upwards, not including the winner's stake.

6. Any rider in a steeplechase where the ground is not flagged-out going upwards of one hundred yards on any high road, lane, or public thoroughfare, will disqualify his horse from winning, although he should come in first.

7. Any rider in a steeplechase where the ground is not flagged-out opening any gate or wicket, or passing through any gateway or common passage from one enclosure to another, will disqualify his horse from winning, although he should come in first.

8. Any horse getting away from his rider may be remounted in any part of the same field or enclosure in which the occurrence took place; but should such horse not be caught until he shall have entered another field, then he shall be ridden or brought back to the one in which he parted from his rider. Any jockey so losing his horse may be assisted in catching him and remounting him without risk of disqualification; and in the event of a rider being disabled, his horse may be ridden home by any person of sufficient weight, provided he be qualified according to the conditions of the race. No penalty shall be exacted for carrying over-weight in this instance.

9. Should the weather or ground be in a doubtful state for running, it shall be left entirely to the Stewards, who may order the chase to be postponed for any time whatever, according to their discretion; and all

nominations, subscriptions, and bets shall stand good, the same as if the chase had taken place on the day originally fixed.

10. In nominating a horse, gelding, or mare the first time for a steeplechase, its full pedigree must be given, if known; otherwise it shall be sufficient to state its age, colour, and the name in which it has and is hereafter to run, together with such description as will distinguish the animal from any other running in a similar name, either in flat races, hurdle races, or steeplechases.

11. Should the name of any horse be changed after having been once entered in either a flat race, hurdle race, or steeplechase, it shall be necessary in all subsequent entries to state his original name as well as any other names under which he may previously have been entered.

12. Every person who shall ride for a steeplechase shall be weighed immediately after the same, and shall be allowed 4 lb. above the weight specified for his horse to carry (provided his weight be not increased by immersion in mud or water), and no more, unless the weight he actually rode be declared as the weight he intended to ride; and if any horse shall carry more than 4lb. above his weight, without a declaration having been made by the jockey or the owner of the horse, or by his servant, to the steward or clerk of the course, before starting, then such horse shall not be considered the winner of the race, even though he should come in first, but shall be placed as the last horse in the race, and his owner shall pay the stake as for a beaten horse; and whether the horse comes in first or not, the jockey shall be fined £5 for his neglect, and shall not be allowed to ride in a public race until the said fine be paid.

The person appointed by the Stewards to weigh the jockeys shall, immediately after each day's racing, report to the clerk of the course how much each horse carried, where he carried more than 4lb. above the specified weight; and the clerk of the course is, as soon after as may be, to communicate such report to the Stewards, or one of them; and the weight each horse actually carried, if more than 4lb. above his weight, shall be published in the first list printed after the race.

13. In all handicaps with 20 subscribers the lowest weight shall be 10st., and when the highest weight accepting is under 12st. 7lb., it shall be raised to that weight, and the others in proportion.

14. The names of all horses whose stakes and forfeits are not paid shall be published in the Racing Calendar at the end of every year, and Messrs. Weatherby, Old Burlington-street, London, or whomsoever they may appoint, are the persons to whom all stakes and forfeits for the different steeplechases are payable.

15. The Stewards shall have power to disqualify any horse from being declared the winner of a steeplechase, although he should come in first, if it can be clearly proved to their satisfaction that the jockey by any deliberate foul riding intended to knock down any horse, or in any determined way to jeopardise his chance of success in the race.

16. If any flag, post, or boundary mark be placed in the course, no matter by whose order, after the riders have been shown over the ground, or had the line of country pointed out and explained to them, it shall not be considered binding, or of any effect, unless such alteration or addition shall

have been particularly named previous to starting to all jockeys about to ride in the races by one of the stewards, the clerk of the course, or by their representatives.

17. If a horse refuse any fence in a steeple-chase, and it can be proved to the satisfaction of the stewards that he has been led over a fence by any of the bystanders, or has been given a lead over one by any horseman not riding in the race, the horse shall be disqualified from winning, although he should come in first.

18. Any jockey who shall be found guilty of foul riding shall be fined for the first offence a sum not exceeding £25, to be paid before he shall be permitted to ride in any race, and for the second he shall be prohibited from riding in any race until such time as the Stewards shall think fit.

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